United States Court of Appeals

for the Second Circuit



APPELLEE'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

76-7476

and the following related appeals:
76-7486 76-7488 76-7489 76-7494 76-7495 76-7499 76-7500

To be argued by
PHILIP MANDEL

B

P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, SANFORD ROGGENBURG, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman),

Additional Defendants on Counterclaims-Appellants-Cross-Appellees,

LAWRENCE J. BERKOWITZ,

Additional Defendant on Counterclaims-Cross-Appellee.

UNITED STATES COURT OF APPEALS
MAR 11 1977
SECOND CIRCUIT

Appeal from a Judgment of the United States
District Court for the Southern District of New York

BRIEF OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellee,

- against -

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, SANFORD ROGGENBURG, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman),

Additional Defendants on Counterclaims-Appellants-Cross-Appellees,

LAWRENCE J. BERKOWITZ,

Additional Defendant on Counterclaims-Cross-Appellee.

==========

BRIEF OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS

==========

PRELIMINARY STATEMENT

These are appeals from a judgment of the United States District Court for the Southern District of New York (Hon. Richard Owen, J.) entered on September 1, 1976, decision not yet reported. The appeals also relate to an order made by Hon. Robert J. Ward, J. entered on October 16, 1973 and reported at 365 F. Supp. 1364.

Plaintiff and certain additional defendants on counterclaims appeal from the judgment against them. Three additional defendants on counterclaims have not appealed from the judgment against them: John F. Settel, Harold J. Richards and the Estate of Ned D. Frank.

Defendants Gross, Bleich and Donoghue have cross-appealed from so much of the judgment as: dismisses certain of the counterclaims; dismisses the First, Second and Fourth Counterclaims as to Lawrence J. Berkowitz; and fails to award damages to Charles Gross under the Fourth, Eighth and Ninth Counterclaims with regard to destruction of his employment with Rafkind & Co.

Judge Owen issued a 30 page opinion after a 7 week trial, in which he found plaintiff and all but two additional defendants on counterclaims guilty of engaging in a conspiracy in breach of fiduciary duties to injure defendants Gross, Bleich and Donoghue in connection with their interests in the partnership of Newburger, Loeb & Co. Wrongful acts found by the judge to have been committed as steps in the conspiracy

included: wrongful sale of all of the partnership assets induced by "special considerations" paid to General Partners, and made without the authority of all General and Limited Partners as required by §98 of the Partnership Law; issuance of a dishonest opinion letter by an attorney, acting in a situation of conflict of interest, that the sale of assets was properly authorized; use of false accounting figures; conversion of certain securities vested in Gross; defamation of Gross; and the bringing of baseless and fraudulent litigations. The judgment awarded an aggregate of compensatory damages to the three defendants in the amount of $625,830.25, punitive damages in the amount of $50,000 awarded to Gross, plus interest and costs.

The Judgment denied relief to Gross in connection with the destruction of his employment as a trader by Rafkind & Co. through the threat of litigation based on a clause in the Partnership Agreement restricting post-partnership employment. The Court found that the destruction of this employment had no economic justification, but was accomplished by the conspirators to "club" Gross into submission to their plans with regard to the partnership assets, but nonetheless denied liability and damages. The cross-appeal relates to this denial.

Issues Presented

A. The issues on the appeal are:

1. Does the record support Judge Owen's Findings that appellants carried out a conspiracy in breach of fiduciary duties?

2. Under New York law of Civil Conspiracy is the liability of each conspirator limited to acts personally committed by him which would be separately tortious?

3. Does the record contain sufficient evidence to support Judge Owen's finding of complicity with regard to the respective appellants?

4. Is there federal jurisdiction over the counterclaims on which the judgment is based:

(a) Does ancillary jurisdiction exist as to the counterclaims because they are "logically related" or "linked" to matters in the complaint?

(b) Is there pendent jurisdiction as to Counterclaims First through Eighth because of their connection with the Ninth Counterclaim, which is based on the Sherman and Clayton Acts?

5. Did Judge Owen have the right to assess punitive damages against some of the conspirators?

6. Were Judge Owen's findings as to compensatory damages clearly erroneous?

B. The issues of the cross-appeal:

1. Was the destruction of Gross' employment with Rafkind wrongful under the Sherman Act or otherwise?

2. If the cross-appeal is sustained, and the matter is remanded to the District Court to find damages in connection with the destruction of the Rafkind employment, should the District Court be instructed to reconsider the question of Berkowitz' liability?

AN OVERVIEW OF THIS APPEAL

Judge Owen issued a thirty page opinion containing extensive findings of fact, and it seems to us that the eight briefs submitted by appellants base themselves in large part upon versions of the facts inconsistent with Judge Owen's findings, and not supported by the record.* This is outstandingly true of the brief submitted on behalf of Kayne, wherein time and time again purported facts are set forth as gospel, when actually they are based upon the testimony of Kayne and his fellow conspirators which was rejected by the Court. The same error underlies the brief submitted on behalf of Finley Kumble.

For example, Finley Kumble Point III -- "Finley Kumble is not liable for the actions of its clients" -- ignores the findings of the Trial Court that a conspiracy existed, that "Without question, Persky was at the heart of this entire matter" (P532) and that all of the conspirators "were actively participating, knowing what each was doing and hoping to reap substantial benefits from this joint conduct" (P526).

The brief on behalf of Finley Kumble also argues that Persky and that law firm "... did not act as a principal or in any way go beyond the traditional lawyer's role". This position shuts its eyes to the Court's finding, based on overwhelming evidence, that Persky performed numerous acts in furtherance of the conspiracy, including defaming Gross, issuing a false opinion letter, instigating fraudulent litigation, uttering threats, and planning the steps to be taken by other conspirators. Judge Owen found that Persky went far

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* By way of contrast, most of our record references go to documents or testimony of adverse parties or their witnesses.

beyond the lawyer's role: he was "... not only counsel thereto, but one of its actors and spokesman" (P534).

The briefs on behalf of Finley Kumble and Kayne also join in promulgating a view of the New York law of civil conspiracy, which is entirely without foundation in precedent or reason. They argue that each conspirator can be held liable only for acts which are separately tortious, and which are committed by himself personally. The briefs do not make this argument openly or sharply, but analysis of their arguments will show the Court that they are based on this unarticulated premise.

The New York rule that conspiracy does not exist as an independent substantive tort (Finley Kumble brief, Point II (A), Kayne brief, pp. 27-29) merely means that no tort is committed when a conspiracy to commit a tort is not followed by any wrongful overt act. The scheming and planning, <u>if never carried out</u>, do not of themselves constitute an actionable wrong. However, New York law is crystal clear that once an overt tortious act is committed pursuant to the conspiracy, all of the conspirators are connected to it and are liable for the acts and declarations of each other.

There is a third major flaw running through our adversaries' briefs: they completely shut their eyes to the fact that this case involves a conspiracy to breach fiduciary duties. Since the standard applicable to fiduciary behavior is a special standard of good faith rather than the morals of the marketplace, there is no merit to the arguments made by our adversaries which are based upon standards applicable to dealings between strangers. For

example, our adversaries argue that the "baseless and fraudulent"* litigations brought pursuant to the conspiracy do not constitute malicious prosecution or abuse of process. The short answer is that we have not pleaded any causes of action for those torts. Instead, we have pleaded, and proved, and the Court has found, that as one step in a conspiracy fiduciaries have abused their position by bringing litigations in bad faith as a means of holding off return to defendants of their large sums of capital.

We regard it as an astonishing and revealing fact that not a single one of the General Partners charged by us with liability for misuse of the Buckley claim could be prevailed upon to come to testify at the trial that he believed in good faith that the claim had merit.

In weighing appellants' contentions therefore, we respectfully ask this Court to bear in mind:

(1) that the facts as found, and all reasonable inferences therefrom must govern, not appellants' version of the facts;

(2) that each conspirator is liable for every act and bound by every declaration of all of the other conspirators;

(3) that the conspiracy pleaded and found was a conspiracy in violation of fiduciary duties, and that the test of wrongdoing is the standard of good faith which accompanies the fiduciary relationship.

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* Judge Owen's finding, P532.

FACTS

Newburger, Loeb & Co. was a partnership engaged for many years in the stock brokerage business. As part of its activities it acted as "clearing house" for a number of smaller brokerage houses. From at least May 1959 until December 31, 1968 Gross & Co. was an originating house clearing through Newburger, Loeb & Co. Gross & Co. was a partnership consisting in part of the defendants in this case, Charles Gross, his sister, Jeanne Donoghue, and an old family friend, Mabel Bleich. Another partner in Gross & Co. was Charles Jordon who brought with him to Gross & Co. a customer named Buckley. There were still other partners in Gross & Co. who were not in any way individually involved in this case.

During all but the last few months of the time that Gross & Co. was clearing through Newburger, Loeb & Co. the Gross firm was physically located inside the Newburger, Loeb main board room, and Newburger, Loeb paid the rent. In accordance with the common practice Newburger, Loeb & Co. shared with Gross & Co. the commissions generated by the Gross & Co. business.

In October of 1968 the partners of Newburger, Loeb & Co. invited Charles Gross to join their partnership, and Gross agreed to do so. Effective January 1, 1969 Gross invested about $900,000 in the partnership which brought him in as equal to the

three other partners having the largest interest in the firm. His sister, Jeanne Donoghue, and Mabel Bleich became Limited Partners of Newburger, Loeb & Co. investing $75,000 each. Charles Jordon and the other partners of Gross & Co. went their separate ways.

Newburger, Loeb was already suffering from "back office" and other problems at the time the defendants joined it, and in the ensuing period it was overtaken by the general debacle that destroyed and crippled so many Wall Street houses in that period. By the spring or early summer of 1970 the firm's losses had reached painful proportions. Many of the old time partners who had the largest share of profits and losses had lost so much money in the course of the firm's operations that their capital positions were entirely wiped out, and they were accumulating capital deficits which they owed to the firm, but did not pay. This was not true of Gross, because he had contributed more than twice the capital required in connection with his percentage interest in the firm.

The Partnership Agreement provided for two kinds of capital contributions by General Partners: - "committed capital" (E416) and "additional capital" (E418). The committed capital represented the minimum contribution of risk capital in connection with each percentage of partnership profits. The additional capital was voluntary, and would entitle a contributor to an additional reward in the nature of interest. The Partnership Agreement created different rights with regard to the withdrawal of committed and additional capital (compare ¶3.2, E417 with ¶3.3, E418). Additional capital could be withdrawn on demand.

In July of 1970 certain newer and younger partners, having an aggregate in interest of about 8% in the partnership,

approached Gross and suggested that he resign as Managing Partner in favor of Fred Kayne, who had been admitted to the firm early in 1970 with a 2% interest. These relatively junior partners did not represent the Executive Committee, and they had no power to "oust" Gross as some of appellants' briefs suggest, nor did they have the power to elect Kayne in Gross' stead. However, their approach precipitated a decision on Gross' part. He told the young partners that he would go along with their suggestion, and would himself resign from the firm in a short time.

Kayne's Campaign to Take Over the Business

As soon as Kayne became managing partner he began to plan to take advantage of his position and of the troubled situation of the Partnership, in order to manipulate matters so that he and a few friends could get control of the business, and its $4,000,000 to $5,000,000 of assets for pennies.

Kayne immediately began to recruit the New Team to take over Newburger, Loeb. He brought in his friends Risher and Muh as a consulting team, and they were soon charged with "running the business". Kayne also recruited the law firm of Finley Kumble and its partner, Robert Persky, to replace existing legal counsel of Newburger, Loeb & Co., and he brought in Lawrence Berkowitz from California to act as "in house" counsel. Kayne promised Risher, Muh, Berkowitz and his old time friend, Sloane (who joined Newburger, Loeb & Co. at the same time as Kayne),insider participation with him in the corporation that would take over the Newburger, Loeb business (A2880-2882).

At Kayne's very first meeting with the Executive Committee, which took place on August 24, 1970 at the offices of

Finley Kumble, a legal stenographer was in attendance to transcribe everything that was said. Kayne read a prepared statement (E380) which he later denied had been prepared by Persky, although he had to admit that it was typed in the Finley Kumble offices and had been "edited" by Persky's associate, Bamberger (A3567). The White Paper (E380) was based on the same strategy that was later employed against Gross. Kayne accused the Executive Committee and its members of various types of wrongdoing and stated that he wanted it to be clear that he was reserving all of his rights against them (A3555). Indeed, some of the accusations he later made against Gross individually he now made against others. The presence of the new attorney, Persky, and the court reporter, were meant to lend weight to the gravity of Kayne's thinly veiled threat to sue the General Partners who stood in the way of his future plans. He admitted that the reservation of rights against all his partners was his recurring theme (A3555).

Kayne's performance so disgusted Gross that he accelerated his plans to retire from the firm and submitted a notice of withdrawal under date of August 31, effective September 30, 1970. Other partners began to immediately urge Gross to withdraw his resignation. Robert Newburger, who had received one copy of Gross' resignation, said he had not shown it to anyone and hoped that Gross would retract it (A2126).

A few days later, on September 3, 1970, Kayne held a secret meeting with Persky, Frank and Richard Stern in which Kayne said (E784-786) that he had a meeting scheduled the next day with Charlie Gross and that he intended to get a withdrawal of the resignation "nicely or otherwise". Kayne said it was not within

his "game plan" to have Gross retire at the present time. In connection with that same secret meeting, the participants worked up a list of alleged grievances and threats to be used against Gross (E786).

The exhibit at E786 is worth a good hard look by the Court because it gives a peek behind the curtain of secrecy which usually prevails in a conspiracy, and reveals the dishonest plans of Persky and Kayne. As far back as September 3, 1970 Kayne and Persky were plotting to coerce Gross by threatening to sue him with regard to a list of alleged grievances, most of which had nothing to do with him. Even more important, the list of "threats," so identified in the notes of one of the conspirators, includes the tactic of blackmail. Persky and Kayne planned to threaten that they would "expose lies to authorities."

Introductory information about Persky is here in order. Judge Owen found that "Without question, Persky was at the heart of this entire matter, guiding the entire plan, carrying threats to the dissidents and knowingly counselling, advising and instituting baseless and fraudulent lawsuits to achieve the new team's goal ...". Judge Owen's opinion charitably omitted to mention that in weighing Persky's testimony he had before him a record of two federal felony convictions and a jail sentence involving Persky's role in connection with a "Byzantine plot"* to conceal the theft of $480,000 from a public corporation of which he was attorney and secretary (A1076; A1182-1198).

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*Those are the words of this Court on the appeal from Persky's first conviction: U.S. v. Zane, et al, 495 F.2d 683 (2d Cir, 1974) cert. denied 419 U.S. 895.

Kayne and Persky met with Mr. Gross on the day after their secret meeting with Richard Stern and Frank. Kayne said that he was preparing to buy the Newburger, Loeb business for himself and some associates and that he wanted Gross to stay on as a partner because he felt Gross was somebody "with whom he could deal" (A2327). When Gross refused to retract his withdrawal from the firm, Kayne made harsh remarks, and as the meeting broke up Persky said "well, you know, Charlie, we can make it so that you will be sorry you did not do what Fred asked." (A2328) Within the next week Robert Stern and his attorney met with Mr. Gross to ask him to withdraw his resignation. Stern said Kayne had made a proposal to purchase the firm which the partners did not wish to accept, and he intimated that the partners would want Gross back in the position of Managing Partner (A2329).

On September 29, Gross sent the Partnership a letter demanding return of his additional capital pursuant to the Partnership Agreement (E859); on October 28 he sent a letter demanding return of 15% of his committed capital pursuant to the Partnership Agreement (E860); and on the same day Gross sent a letter to the Partnership demanding interest pursuant to the Partnership Agreement (E861); and on November 23, 1970 he sent a letter restating his prior demands (E378). All of these proper demands were ignored by the Partnership, and at the time of trial in 1975 Gross still had not received any portion of his capital or interest (A2338).

The December 31 Preliminary Agreement

In the meanwhile, with Gross off the scene, the affairs of the Partnership were moving toward a crisis. By November numerous

partners had submitted letters of withdrawal, including each and every Limited Partner other than Bleich and Donoghue. The imminent withdrawal of capital, plus continuing operating losses, threatened to put the Partnership in violation of the Stock Exchange Capital Rules, and the Stock Exchange was threatening to suspend the firm.

One of the major reasons that Newburger, Loeb was in a capital violation position was that under the rules of the Exchange, and under ordinary accounting conventions, sums owed by the partners to the firm are not treated as assets or capital. Thus, capital deficits of certain General Partners, which towards the end of December aggregated about $1,400,000, were not taken into account, nor were the capital accounts of the Limited Partners, who had given notice of withdrawal from the firm. As a temporary measure, the Exchange was pacified by repeated extensions executed by the Limited Partners with regard to the time when they had the right to take their capital contributions out of the firm. However, towards the end of December, Persky and the New Team, who were dealing with officials of the Exchange, stated that the Exchange would close down the firm unless agreement was reached by December 31, 1970 on some plan insuring adequate capitalization.

This deadline spurred an all-night-stand on December 31, as a result of which the form of an agreement was produced, and the Exchange was pacified, although it was clear that the agreement was incomplete with regard to schedules, and incomplete with regard to certain vital signatures and that nobody was bound by it (A2908). The proposed agreement gave the New Team what it had been scheming for from the outset. The Subordinated Lenders and Limited Partners agreed to give up their rights to receive cash from the old partner-

ship and to accept in lieu thereof securities and obligations of the corporation. Additional capital was brought into the picture by one Alex Aixala who put up stock of the Bacardi Company with an apparent market value of $1,000,000 under arrangements by which his stock would be returned to him at the first sign of financial danger (A112). The deficit General Partners were induced to consent to this deal by being forgiven, in the aggregate, more than $500,000 of the debt owed by them, and the balance of their debt was to be paid to the Corporation by an assignment of tax refunds which would be due to them shortly from the Federal Government. Almost $1,000,000 was recovered through these tax refunds (A3011,12).

Under the proposed agreement Kayne, Risher and Muh for an investment of $10,000 each would each receive 26% of the common stock of the new corporation. This stock interest would give them control of the corporation's pool of capital, which exceeded $5,000,000. If the business turned out to be disastrous the most these members of the New Team could lose would be $10,000 each. On the other hand, if the business prospered they would be entitled to most of the growth. This was leverage with a vengeance. As a result of this leverage Kayne and Muh were able to sell their respective $10,000 investments one year later for $400,000 each.

The adversaries' briefs make mention of the fact that initially the lawyer for Bleich and Donoghue indicated that he would approve this deal and recommend it to his clients. Arthur Silverman was drawn into this negotiation late, without adequate background, and he did not understand at first how unfair this proposed deal was to everybody except the New Team and the General Partners. When he had the benefit of time to analyse the deal he

condemned it (A1871-1873). Gross, who was completely equipped to understand the complicated transaction at once, regarded it as designed to steal the firm from the people who had money in the firm in favor of new people who had very little investment at stake. Gross felt that the $500,000 forgiveness of indebtedness to the general partners amounted to a bribe for the purpose of inducing them to go along with an outrageous deal (A2344).

Silverman testified that he too came to understand the deal as an effort to steal the business, and in retrospect he felt that the financial figures presented by the New Team understated assets. He reached this conclusion by comparing the financial figures which were presented by the New Team in December with the subsequent audited statements of Peat, Marwick & Mitchell (A1961-1968).

In any event Mabel Bleich and Jean Donoghue each determined for her own reasons that she did not want to go along with the deal. Charles Gross' rejection of the proposed deal was anticipated from the beginning, which is why Kayne, Persky and the deal's other promoters were planning grievances and threats against him.

It is now necessary to "flash-back" to 1962 in order to explain the Buckley situation and the way Persky seized upon it in November and December of 1970 as a ploy to be used against Gross, Bleich and Donoghue.

The Buckley Situation

When Jordon joined Gross & Co. in 1962, his customer, David Buckley, came along too. During the period of 1962 to 1966, Buckley carried an account with Newburger, Loeb & Co. "Courtesy Gross & Co." in which he engaged in active speculation, at times

with spectacular success. During most of this period Buckley's investment was in the order of $100,000 to $150,000, and at one time he had an indicated profit of about half a million dollars in Syntex. Later he had an indicated profit of about half a million dollars in Westec. In order to increase his speculative leverage Buckley used margin to the hilt, and engaged in the purchase of calls and other speculative devices.

Buckley and his wife owned a 22-room house situated on eight acres of land in Rumsen, New Jersey. The largest source of Buckley's funds came from large annual gifts from his father, who was one of the leading executives of a major corporation. Buckley was well-educated. He had an Undergraduate Degree in Business from Cornell University and a Master's Degree majoring in business. During the years 1962 through 1966 he was an executive of Lever Brothers with important responsibilities. He had highly placed friends in the financial community, whose advice he constantly solicited and considered. He subscribed to expensive financial publications and services, and he kept his own records of all of his numerous brokerage transactions in his various brokerage accounts.

At no time did Buckley give Jordon discretion of any kind with regard to his account. No formal discretionary power was ever granted in writing, and there was never any informal grant or exercise of discretionary power. Buckley testified that every single transaction taken in his account was either initiated or approved by him in advance. Most of the transactions in Buckley's account originated with Jordon's suggestions, but a

substantial number originated with Buckley's own thoughts, or recommendations from his other sources in the investment community. Buckley testified that he rejected about four out of five of the suggestions which Jordon made to him.

The trial court found that Buckley controlled his own account, was thoroughly knowledgable as to the market, and that the transactions in his account were motivated by his desire to make his name and fortune in the market by profitable speculation.

At no time did Buckley have the slightest contact with Charles Gross, Mabel Bleich or Jeanne Donoghue. Buckley himself testified that he never so much as met any of these people or spoke to them on the telephone.

Beginning about September of 1965, Buckley began to accumulate stock of Westec Corporation, which turned out to be one of the most volatile high-flyers of the era. When Westec reached its height he had a paper profit of about a half million dollars. And all the time that Westec was going up, Buckley was using the extra buying power afforded by the increase in market value to buy more and more stock on margin. Buckley had a substantial holding of Westec in his Merrill Lynch account, as well as in his account with Newburger, Loeb.

Unfortunately, the bubble burst in August of 1966. It turned out that Westec was one of the big swindles of the era, and when the facts came known, the Stock Exchange suspended trading in Westec. Without the value of the Westec stock, Buckley's account went overnight from a position of substantial equity and profit to a position where the debt on margin greatly exceeded the market value of the securities. Newburger, Loeb & Co., whose

margin loans were secured in large part by the Westec stock, was deprived of its security.

From 1966 through 1970, Newburger, Loeb & Co., through Leo Stern and other partners, tried to collect from Buckley the amount he owed on his account, and Buckley pleaded inability to pay. Buckley had a number of meetings with partners of Newburger, Loeb accompanied by his lawyer, Mr. Ryan, in which Buckley admitted his debt and asked for time. In May, 1969 Westec was reinstated for trading, at which time its price was 11-3/4. Leo Stern decided not to sell the Westec stock at that time, although Newburger, Loeb probably had the duty to do so under the margin regulations (A954). Stern and other representatives of Newburger, Loeb & Co. telephoned Buckley from time to time, urging him to make payments on his account, without success, except that in June 1969 Buc y transferred 2,500 shares of Westec from his Merrill Lynch ac unt to the Newburger, Loeb account at a time when the stock was trading at 6. This additional Westec stock Stern likewise failed to sell, but kept in the otherwise dormant Buckley account as security for the debt.

In November 1969 there were some discussions between attorneys for Newburger, Loeb & Co. and Buckley's lawyers which resulted in a settlement proposal on Buckley's part. Westec had declined further in the meanwhile. Buckley stated he was unable to pay the large sum he owed to Newburger, Loeb & Co. and that a judgment against him for his debit balance would force him into bankruptcy (A1568). He stated that he preferred to spare his reputation the stigma of bankruptcy, and that his father was willing to pay Newburger, Loeb $25,000 if the Partnership would

take this sum plus the securities remaining in the Buckley account in exchange for a full release of Buckley's debt (E122). Buckley's lawyers furnished a balance sheet to substantiate their claim that Buckley could not pay (E117, 118).

During all of this time, from 1962 until the end of 1969 neither Buckley nor his attorneys had ever asserted any claim that his account had been churned, or mishandled in any other way.* Buckley's delivery to Newburger, Loeb of stock out of his Merrill Lynch account in June 1969 for application against his debt was a concrete recognition that he acknowledged the debt. In fact, Buckley sought out Charles Jordon in 1969 at Jordon's new brokerage firm to do further business with Jordon (A342).

Golenbock & Barrel, the attorneys handling the matter for Newburger, Loeb, were not convinced of the validity of Buckley's claimed inability to pay, and in June 1970 they commenced an arbitration under the rules of the New York Stock Exchange, demanding judgment in the amount of the full debt plus interest (E101).

The Buckley Churning Claim

In August, 1970 Buckley filed an answer, setoff and counterclaim in the arbitration proceeding in which he alleged three claims against Newburger, Loeb & Co., the first two of which are relevant to this appeal: (1) that Newburger, Loeb's failure to sell the Westec stock after trading reopened in 1969 resulted

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*Buckley's lawyers hired an expert to examine the account after its collapse in 1966, and they concluded that the account had been handled properly (A451-457).

in damages to Buckley of $159,650;* (2) that from 1962 until 1966 Newburger, Loeb & Co. had churned Buckley's account "through its acknowledged agent and representative... Gross & Co." causing damages, measured by brokerage commissions paid Newburger, Loeb & Co. and Gross & Co. in the amount of $75,000 (E110).

Buckley never sued Gross & Co., never sued Charles Gross, and never sued Charles Jordon, who was actually the person in Gross & Co. with whom he had all his dealings during the entire period of 1962 through 1966. Buckley's claims seemed defensive in nature and designed by Buckley and his attorneys to stimulate a settlement of the large debt which Buckley owed. After the assertion of these large counterclaims, Buckley continued to keep open the same settlement proposal which had been made before the commencement of the arbitration: Buckley's father would throw $25,000 into the pot, and Buckley would give up all of his claim to the securities still in his account in exchange for a release. Later the offer was raised to $50,000 (A1092).

The Newburger, Loeb partnership made an investigation of the Buckley churning claim. Richard Miles, a person who had no prior contact with Charles Gross or Charles Jordon, was the Director of Compliance of Newburger, Loeb & Co. at the time, and he studied the entire file. Miles and Arthur Silverman, who had been handling the arbitration on behalf of Newburger, Loeb, met with Jordon for an in depth interview. At the conclusion of the investigation, Miles was convinced that the churning claim

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*Leo Stern admitted responsibility for this decision, and admitted Gross had nothing to do with it (A1546-1547).

was a tactical move (A1502) and "essentially a frivolous counterclaim". Silverman had the same opinion. Mr. Miles communicated his judgment of Buckley's churning counterclaim to the General Partners, who agreed with Miles' assessment. The attorneys were instructed to proceed with the collection under the arbitration (A1503).

Persky's Manipulation of the Buckley Matter

About November 1970 Persky and his law firm took over representation of Newburger, Loeb & Co. in the Buckley arbitration. Persky held a few meetings with Buckley's attorneys in which they discussed the proposed settlement which Buckley was still holding open. Implicit was a threat that if Newburger, Loeb & Co. won the arbitration, Buckley would go into bankruptcy and the brokers would collect nothing. In deposition Persky admitted that the portion of Buckley's claim which related to Newburger Loeb's failure to sell out the Westec stock on the reopening of trading (Leo Stern's decision) probably had some validity, or at least was a troublesome threat to Newburger, Loeb & Co. in the arbitration. Persky felt that the offer of $50,000.00 was the highest amount which Buckley would pay.

In December 1970 the negotiations regarding the Transfer Agreement were coming to a climax, and Persky also brought the negotiations with Buckley and his attorneys to a climax. At that time, Persky knew that there was a good chance that Gross, Bleich and Donoghue would not go along with the proposed Transfer Agreement, and if Gross, Bleich and Donoghue were to be paid out the sums owed to them, the other Limited Partners and Subordinated

Lenders would not agree to the plan (A1273, 1274). Persky had been searching since September for threats and claims which might be used against Gross, and he immediately recognized the corrupt opportunity afforded by the Buckley situation.

Accordingly, in December 1970 Persky informed Buckley's attorneys that the proposed settlement would be accepted by Newburger, Loeb & Co., but he also wanted Buckley to assign to Newburger, Loeb & Co. a churning claim against Gross & Co. Buckley's lawyers readily assented, and the settlement was made.

The statement in the Finley Kumble brief, p. 41, that it was Berkowitz,not Persky, who was the "moving force behind the settlement", represents a remarkably unfortunate misunderstanding of the record. It is entirely clear, even from Persky's own testimony, that he and he alone was the "moving force" behind the settlement which the Trial Court inferred was made in bad faith (P519).

The arbitration file was turned over to Persky in November, 1970 (A1088). Persky alone dealt with Buckley's attorneys until he reached the final terms with them (A1296-1339). After Persky reached a settlement suitable to himself, he merely asked Berkowitz, as house counsel, to obtain consent of the Partnership (A900-902).

The key factor of bad faith was the assignment of a churning claim by Buckley against Gross & Co., a device which gave a colorable basis to withhold payments which would otherwise be due to Gross, Bleich and Donoghue. Persky and Finley Kumble proffered three mutually inconsistent explanations of the origin

of the idea that the Partnership take an assignment of a churning claim against Gross & Co. In deposition Persky testified that it was his own idea to take the assignment (A1324, 1325). At the trial Persky said that the assignment had been suggested to him by Larry Berkowitz (A1324). Berkowitz denied this, testifying that Persky told him the assignment had been offered by Buckley's lawyers (A1212). Later in the trial, Finley Kumble offered the testimony of another partner, Mr. Snider, who testified that for technical reasons under the Securities Laws, a release was sometimes considered to be legally ineffective, and that the devise of an assignment of the claim to the alleged wrongdoer was used as a method of securing an effective release. Snider testified that it was this consideration which served as the origin of the assignment of the Buckley claim (A3117, 3118). However, this version was belied by the fact that no assignment was taken of Buckley's claim against Newburger, Loeb, which would be the logical result of Snider's reasoning, and that the actual assignment of the claim against Gross & Co. would serve no purpose with respect to releasing Newburger, Loeb.

Persky's co-conspirator, Risher, testified that after making the settlement Persky called him to brag about the good idea which he had originated: to get an assignment against Gross et al. (A2899). It was a damned good idea and Persky was proud of himself (A2900). Persky's tactic was to get Buckley's defensive churning claim as a little "extra" thrown into the settlement (A1332, 1333), then to sue Gross et al. for many times the damages claimed by Buckley (P519, 520). Persky even insisted that the Buckley settlement contain a provision that the Buckleys

must cooperate in the prosecution of the claim against Gross & Co., or their release would be invalid (A1325).

The settlement made with Buckley was a piece of Partnership business, resulting in an adjustment of the year's profit and loss, in which Gross shared. Since the settlement also changed the financial condition of the Partnership it affected the situation of Bleich and Donoghue as Limited Partners. The circumstances provided ample support for the conclusion that the settlement was authorized in bad faith by the partners, who had previously reached the judgment that the Buckley claim was frivolous and merely tactical.

Persky testified on deposition that his purpose in getting the assignment from Buckley was not to sue on it but to use it as pressure in forcing Gross to go along with the Transfer Agreement, and that he intended to use the Buckley claim to show Gross the "reality" of the fact that there were numerous claims against him (A1328, 1329).

Persky's bad faith is further shown by the fact that he seized upon the churning claim immediately, without any investigation regarding its merits. Persky knew that control of the account by the broker is a sine qua non of a valid churning claim (A1311; A3166, 67) yet he made no investigation whatsoever to ascertain what the facts were with regard to control.* He claimed that he misread something in the file, and erroneously understood that the account was discretionary (A1311), i.e., that

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*Intense activity and speculation are not illegal when carried out by the customer. Only when the broker controls the account can the offense of churning occur.

the account was one in which the broker had written authority to buy or sell in his own discretion without consulting the investor. Yet all of the documents in the file show the contrary. The Buckley counterclaim in Arbitration states that the trades were made on the advice of the broker (E112), and makes no allegation that the broker had power to act on his own. Even the Complaint prepared by Persky's law firm alleges that the trades were made on the advice of the broker, without any claim of discretionary power. Further, Mr. Snider, Mr. Persky's associate, who actually drafted the Complaint based on information he got from Persky, testified that he understood the account was not discretionary (A3166). (Mr. Snider was not present during Persky's testimony).

As Judge Owen found, the Complaint itself maliciously emphasizes the statement that Charles Gross was the person in charge of the Buckley account, who personally committed the churning (P520). This allegation was entirely false. Buckley never met or dealt with Gross (A140; 411, 412) during all the years he was doing business with Jordon. This false accusation against Gross was not one of mere technical wrongdoing. Gross was charged with deliberate dishonesty and betrayal of a customer's trust, an accusation which strikes to the heart of the professional honor which is so important in securities dealings.

Faced with this patently false statement about Gross contained in a Federal pleading, Persky testified that he misunderstood something which Buckley's lawyers had said to him, and thus got the idea that Gross personally handled the Buckley account. Again, Persky was given the lie by cross-examination of his partner Snider, who testified that Persky told him to

"assume" that Gross personally handled the account (A3136-3138).

We believe that the facts amply support the District Court's conclusion that Persky manipulated the Buckley settlement in bad faith as part of the conspiracy.

Persky's Use of the Buckley Claim

Persky promptly put the Buckley claim to the intended use. The Buckley settlement was signed on December 30, 1970. On January 14, 1971 Persky told Arthur Silverman in a telephone conversation that it would not serve Gross' interest if the deal were blown - "several people would be looking for his head". (E697). On January 15th Persky, Risher and Muh met with Mr. Gross and his attorney in an effort to persuade them that Mr. Gross should go along with the deal. In addition to the other false claims which had been previously used to threaten Gross, Persky now stressed the serious danger to Gross presented by the Buckley claim. Persky said it would be in Gross' interest not to be tied up in litigation for a long, long time, and to be free to work in Wall Street (A2344-45).

As Judge Owen found, when these threats failed to have the desired effect upon Mr. Gross, Risher, Muh and Persky immediately called Kayne in California, and within minutes thereafter Sloane telephoned Gross, and said "if you kill the deal you will be sued for a long time" (P526).

A few weeks later, on February 5, 1971, there was a large meeting attended by all factions interested in the deal, including Limited Partners, General Partners, Subordinated Lenders and Gross. Persky brought with him to this meeting a

Federal summons and complaint in final form, based on the Buckley claim, signed by Persky as attorney for the Partnership (E457). This Partnership complaint which was never served and never became an official court paper, contained the same false statements about Gross which were contained in the subsequent complaint served on behalf of the new corporation. Persky circulated this Partnership complaint among the various participants of the meeting and said that in his opinion it constituted a valid claim against Gross (A1103; A1371).

He also gave a copy of the complaint to Arthur Silverman, who then represented Bleich and Donoghue, and said to Mr. Silverman: "You don't think Charley and Mabel are going to get their money without a fight if this deal goes through without their consent, do you?" (A1741).

Persky's circulation of the Partnership complaint containing these false allegations of fraud against Gross was intended to promote the idea that Gross was a vicious person, and that there was at least one valid offset to his claim for the return of his partnership capital. Persky admitted that the Limited Partners and Subordinated Lenders would not go through with the deal if Gross, Bleich and Donoghue were to get out their capital (A1273-74). Thus it was necessary to convince the Limited Partners and Subordinated Lenders that there was a basis on which the corporation could hang onto the capital of these "dissenters". The defamatory "complaint"* which Persky displayed

*This "complaint" was not privileged because it was never served or filed, and no action was started on it. It constitutes libel per se because it falsely accuses Gross of dishonesty in his business or profession. Even when a complaint has actually been served and filed, circulation of it is not privileged if false and malicious: Williams v. Williams, 23 N.Y.2d 592 (1969).

at the meeting, had the triple purpose of coercing Gross, of inflaming the Limited Partners, Subordinated Lenders and their respective attorneys, and of assuring them that Gross' capital would not have to be paid out.

The General Partners of Newburger, Loeb & Co. knew that the allegations against Gross contained in this complaint were false. As Judge Owen found (P511), Newburger, Loeb supervised the Buckley account as part of its compliance activities while the account was active and never questioned its propriety. The Partners knew that it was Jordon, not Gross, who had personally handled the Buckley account. Further, after the recent investigation of the Buckley counterclaim by Miles, the Partnership had joined in Miles' conclusion that the Buckley churning claim was frivolous, and was being employed for tactical purposes to encourage acceptance of Buckley's proffered settlement. The General Partners had a fiduciary obligation to disavow the accusations. Yet they either joined in the false clamor or gave ratification by silence.

The record supports Judge Owen's finding that Persky acted in bad faith in connection with the preparation of the complaints (P520), and that Persky knew full well that Gross had nothing personally to do with the handling of the Buckley account. All of the General Partners of Newburger, Loeb & Co. knew the facts; Buckley knew the facts; Buckley's lawyers knew the facts; Miles knew the facts; Silverman knew the facts; Jordon knew the facts. Persky did not and could not claim that any of these people deceived him. There is not one person who Persky might have asked about this matter who would not have set him straight

at once; yet, he twice drafted complaints which went out of their way to malign Gross as the churner.

Persky had plenty of time to find out the facts. The Buckley matter was turned over to him in November, the settlement was reached in December, and the Corporation's complaint was not filed until the middle of February.

It is noteworthy that not one of the Partners of Newburger, Loeb & Co. who were named as conspirators in the counterclaims of Gross, Bleich and Donoghue, appeared in court to testify that he believed in good faith that the Buckley churning claim had merit. Not one of them appeared at the trial to deny knowledge of how Persky, Risher, Kayne and the other members of the New Team intended to use these claims.

The instant litigation was started on behalf of the Corporation four or five days after execution of the Transfer Agreement. Persky (A1275) testified that no decision to sue on the Buckley claim was made prior to the Closing. This pretense was belied by testimony of a Finley Kumble witness, and by documents forming part of the Closing papers. At the Closing the Corporation agreed that it would not enter into "... any settlement of the claims we have against Charles Gross which involves either the payment of cash or the issuance" to Gross of certain types of the Corporation's securities, without the prior

approval of certain attorneys for Limited Partners (E568).* Further, the potential litigation schedules attached to the Transfer Agreement (E588) include the claims of Gross, Bleich and Donoghue related to their capital accounts.

David Abrams, Esq., testified definitely that it was the understanding on the night of February 11 that no payments were to be made to Gross, Bleich or Donoghue without consent of the Limited Partners, and that the Buckley claim and other claims would be used as offsets or defenses (A4331-4333). Mr. Abrams' law firm, Richenthal, Abrams and Moss, represented certain Limited Partners in negotiating the Transfer Agreement. Later, at Finley Kumble's suggestion, he was retained in the instant litigation to represent the General Partners in defending against the counterclaims of Gross, Bleich and Donoghue. Abrams was called to the stand as a witness for Finley Kumble. Accordingly, Mr. Abrams' testimony was entitled to very heavy weight against Finley Kumble and the General Partners.

Abrams also testified that as far back as the end of January he was aware that the Buckley claim would be used against Gross and Bleich (A4338) to offset payments.

Persky's False Statements About Gross

The Trial Court found that Persky engaged in a campaign of vilification against Gross (P534). This was not purposeless namecalling: it was part and parcel of a plan to cause the Limited Partners and Subordinated Lenders to go along with the

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*The sham nature of the claims against Gross is evidenced by the recognition that they would be settled by making payments to Gross.

proposed Transfer Agreement. It was well known to all that Gross opposed the proposed deal and regarded it as an effort by the New Team to take over the capital of the business for a song. The campaign to slander Gross served to discredit his opinion of the deal.

It was also clear that the Limited Partners and Subordinated Lenders would not agree to give up their claims against the Partnership in exchange for paper of the new corporation if Gross were allowed to stand pat and retain the right to be paid out the amount of his large capital interest. It was therefore essential to the success of the conspiracy to convince the Limited Partners, Subordinated Lenders and their lawyers that Gross had committed wrongs, with regard to which there were good causes of action against him, which could be used as set-offs against his right to receive his capital. Persky played a leading role in this campaign.

In his role as attorney for the Partnership and the New Team, Persky told the Limited Partners and Subordinated Lenders that there were numerous matters constituting valid claims against Gross (A1370-73). Later Persky asked Ned Frank to make up a written list of these alleged claims against Gross, and when Frank did not do so, Persky reminded him of it three or four times (A1360, 61) until Frank finally sent him a long list of charges in a letter dated February 22, 1971 (E152) about two weeks after the closing date of the Transfer Agreement.

Later Persky and Finley Kumble selected the six they considered to be the strongest from among these many allegations against Gross, and asserted them as the counterclaims in the reply. When the moment of truth came in the last days of the trial, four of these six were dropped without the presentation of any evidence whatsoever. Judge Owen found all of these counter-counterclaims to be "baseless" (P534).

The Finley Kumble brief alleges that the reason four of these counter-counterclaims had to be abandoned at trial, and the others failed at trial, was that Ned Frank had died, and thus was unavailable as a witness (Finley Kumble brief pp. 41-42). This allegation is not borne out by the record. Ned Frank died several years before the trial, yet Finley Kumble's attorney, in his opening statement, promised in the strongest terms to prove these causes of action (A5-10, A18-22). The decision to abandon four of them was not made until the very end of the trial (A4466-4468). It seems apparent that if these claims were made unprovable by Frank's death, Finley Kumble would have recognized the fact years earlier.

Even Persky's own testimony negatives the argument that Frank was the star witness. Persky testified that he picked Ned Frank to prepare the list of Gross' alleged misdeeds "... because in addition to being a general partner he was an attorney..." and therefore Frank could articulate the claims in a manner understandable to Persky (A1363). Thus it was not Frank's death but the falsity of the claims which caused the abandonment of the four

counter-counterclaims and the dismissal of the balance.

The Buckley situation, of course, furnished Persky with his supreme vehicle for the vilification of Gross.

Persky's False Opinion Letter of February 11, 1971

In December it was agreed that Persky and his law firm Finley Kumble would represent the New Team and its corporation in connection with the negotiations towards a final agreement, and the partnership would be represented by the Rosenman firm, which previously represented some of the old General Partners such as Andrew and Robert Newburger and the Sterns.

The December 31 Preliminary Agreement contained a standard Seller's representation and warranty that seller "... has the power and authority to execute and deliver this Agreement." (E1094-1095). This representation of authority was omitted from the final agreement signed on February 11, 1971.

Deletion of the warranty of the partnership's authority to enter into the deal has a history which is quite revealing with regard to Persky's opinion letter. On January 15, 1971, Gross' lawyer informed Persky, Risher and Muh that the proposed sale of all the corporate assets could not lawfully be accomplished under Section 98 of the Partnership Law unless every Limited and General Partner consented to it (A2579, 2580). Apparently the Rosenman firm independently became aware of the same problem. Since under the Preliminary Agreement the Rosenman firm was expected to deliver a written opinion "as to the power and authority of the Transferor to enter into this agreement and consummate the transactions contemplated hereby", the matter was of some concern to that firm.

Accordingly, Mr. Paul Burak, the Rosenman partner then in charge of the matter, initiated research on the §98 question, which eventuated in a formal memorandum of law, concluding definitely (A2110) that the proposed sale of the business and assets could not be made without the consent of every General and Limited Partner (E796, E803-808).

At the same time the memorandum was prepared (January 25, 1971), Mr. Burak held discussions with Persky and his junior, Mr. Bamberger, regarding the problem, and he either gave them a copy of the memorandum or gave them the citations embodied in the memorandum (A2117), making it clear that the Rosenman firm would not be able to render the opinion contemplated by the Preliminary Agreement (A2118).

Mr. Burak also informed its client, the Newburger, Loeb Partnership, of the Rosenman firm's opinion (A2114-15) that the Transfer Agreement could not validly be made without the consent of Bleich and Donoghue.

In addition, Mr. Burak immediately began to take steps to protect the signatory partners insofar as possible. He began to work out amendments with Persky's law firm to delete the warranty of authority (A2112-2128; E81), and to get a broad indemnity for the partners from the buyers in the event that they should in the future be held liable for improperly transferring the partnership assets. In the final Transfer Agreement, the Buyer (the corporation) agreed to assume all the liability, including counsel fees, of the selling partnership and its partners in connection with the Seller's lack of authority to make the sale (E38, 91, 97).

At the pre-closing session on February 10, 1971 Persky

again tried to persuade Burak to give his firm's opinion that the Transfer Agreement was properly authorized. Burak was adamant in his refusal (A2128-34). Persky was angry, but he did not claim surprise, at this pre-closing meeting. When the pre-closing was completed it was clear that the Rosenman firm would not in fact come forward with any such opinion (A2135-6).

The next day, at the actual closing, Persky pretended to be surprised that the Rosenman firm was refusing to issue the opinion letter, and said that he would himself issue such an opinion letter (A2137) as special counsel for the Partnership.*

Even apart from the uncontradicted evidence of the documents, there were overwhelming reasons why any trier of the fact would resolve the sharp conflict between Burak's testimony and Persky's in favor of Burak's testimony. The contrasting characters and motivations of these two attorneys are vivid. Persky was a twice-convicted felon, admittedly guilty of filing a false report with the SEC and disseminating a false newspaper release in which he knowingly concealed the theft of half a million dollars from a corporation to which he owed a fiduciary duty as officer and attorney (A1884-1198).

Burak, on the other hand, was scrupulous in the lawyer's role. Although his clients were anxious to make this deal -- among other things the agreement excused them from paying more than a half million dollars in debts owed to the Partnership, and got them releases from all of their liabilities to the consenting

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*Although Persky later pretended that he was requested by the other lawyers to give the opinion letter, in deposition he confirmed Burak's testimony that he volunteered to give the opinion letter (A1386-87).

Limited Partners -- Burak would not stamp out a convenient opinion of authorization. His firm did honest research, and honestly recorded in their memorandum of law their unpalatable but definite conclusion that the agreement could not be authorized under Section 98 without the signatures of Bleich and Donoghue. Having reached this conclusion, Burak honorably reported it to his clients and also to Persky, the attorney with whom he was negotiating.

Further, Burak had no conceivable motive to testify falsely. He was called as a witness on behalf of Gross, Bleich and Donoghue, under the compulsion of a subpoena. The testimony which he was forced to give was harmful to the individual General Partners whom his law firm had represented, because it established that they had elected to go ahead with the sale after having been advised of its illegality. Persky, on the other hand, had every motive to lie to protect himself from the further disgrace and liability which his illegal and immoral acts would bring down on him.

It is easy to understand why Persky pretended surprise to the other lawyers on the night of the closing. Persky wanted this deal to go through at any cost. He concealed the Sec. 98 problem from the attorneys for the Limited Partners and the Subordinated Lenders, because if these attorneys became aware of the problem in advance of the closing, and did independent research, the deal would have been aborted. Persky forestalled independent research by maintaining silence until the night of the closing, when he then and there volunteered his own false opinion, based, as Judge Owen found, upon "alleged 'research'" (P524).

The Fin.ley Kumble brief, apparently recognizing

the devastating effect of Judge Owen's finding that Persky deliberately issued a false opinion letter, devotes three pages to an argument that even if knowingly false, Persky's opinion letter was legally irrelevant. The reason advanced in support of this startling position is epitomized as follows:

> "Since the opinion could have been waived by the Corporation and was not a condition precedent to any other party's obligation to execute the Transfer Agreement, it was not a material document to the actual transfer. The reorganization could have been consummated and the Partnership's property transferred to the Corporation even if it had never been prepared. (Finley Kumble brief, page 49).

In making this argument, Finley Kumble's lawyers, unfortunately, have been doubly misadvised as to the actual facts in the Record. First, as we have pointed out above, at the time of the closing on February 11, there was not in effect an executory agreement binding on anybody. The agreement was executed and closed simultaneously. Anybody could have balked at the last moment for any reason whatsoever. Thus, it is erroneous to analyze the facts in terms of what conditions might exist to anybody's obligation to close.

Actually, it was entirely clear that there would be no closing without the opinion letter. This emerged at numerous places throughout the testimony, but was most clearly stated by Mr. Steefel, a witness called by Finley Kumble, who was the attorney representing Limited Partners in the negotiations. Steefel testified in so many words:

> "I and the other attorneys representing the limited partners said that we cannot close this transaction unless there is an opinion letter as to the validity of this transfer". (A735).

Persky himself testified that he advised Risher and other members of the New Team that if there were no agreement on the opinion letter the deal would be dropped (A1381).

Thus, Finley Kumble's argument that the opinion letter was a formality which the corporation could have waived without affecting the transaction is factually and legally incorrect, and the Record amply supports Judge Owen's finding that the opinion letter was "an essential document" (P523).

In the light of these facts, Finley Kumble's further argument that Gross, Bleich and Donoghue were not injured by Persky's false opinion letter because they did not rely upon it must be regarded as having a tinge of tongue-in-cheek.*

This is not an action for fraud and deceit. The gravamen of the claim of Gross, Bleich and Donoghue is not that they were fooled by Persky's false opinion letter, but that it was given as part of the conspiracy, causing the Limited Partners and Subordinated Lenders to go ahead with the illegal transaction.

The relevant fact is that Steefel and other attorneys reliedupon Persky's opinion. At that time Persky had not been indicted, let alone convicted, and Steefel assumed that Persky was an honest lawyer. Therefore, Steefel did not look into this Section 98 question, but relied on Persky (A747).

Persky's opinion letter was false for another reason, entirely separate and apart from Section 98. Persky knew full well that the signatures of certain of the General Partners had been induced by a "special consideration" in the form of forgive-

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*See pages 77-78, infra.

ness of $500,000.00 of indebtedness. It is clear that the actions of fiduciaries induced by such means are fraudulent and invalid, and that an agreement procured by such means is not properly authorized. Though completely aware of the facts, Persky did not even mention this question in his opinion letter.

The Theft of Gross' "In-Kind" Securities

During 1969 the Newburger, Loeb partnership "earned" certain warrants and other securities which were given to it by the issuer in connection with various deals such as public offerings. Amongst the securities were certain warrants to buy stock of Geon Industries, Inc. and Computer Software Systems, Inc. (later known as National CSS). These were received and held in the firm name at the time for the purposes of convenience and because they were not readily transferrable. On August 11, 1970 these securities were still held in solido in the firm name, and the Executive Committee of the Partnership acted formally to vest ownership of these securities in the respective partners in accordance with their respective interests in firm profits and losses for the year 1969 (E864). In accordance with the Executive Committee's action, a letter was written by Robert Stern on behalf of the Partnership to each partner under date of August 24, 1970 listing these securities and stating in part:

> "The Executive Committee has determined that you therefore own an interest in these securities (which may not be readily transferable or marketable) equivalent to your share as a General Partner in the firm's profits or losses as defined in paragraph 6.3 of the Articles of Limited Partnership as of January 1, 1969." (E848).

It was undisputed that Gross' share of these "in-kind" securities included 1,650 warrants of Geon Industries, Inc. and 3,094 warrants of Computer Software Systems, Inc. (National CSS).

On December 30, 1970, Mr. Kayne wrote Mr. Risher a letter (E847) pointing out that these securities were now of substantial value, and stating that he wished to get all of them for the new corporation and suggesting to Risher that ... "... you get your hands on these warrants and have them held in the vault of one of our banks". A carbon copy of this letter went to Mr. Persky.

At the time this letter was written, Kayne was a withdrawn partner, acting as an employee of the Partnership's California Branch, and Risher was an employee in New York. Neither they nor the corporation which they were promoting had any jot or tittle of claim of ownership or right to possession of these securities. The seizure of the securities, which Kayne directed, probably amounted to an act of larceny, and at a minimum amounted to a high-handed act of conversion.

This revealing document had not been produced on deposition by Kayne, Risher or Persky: It emerged on the last deposition of Mr. Burak, after Magistrate Goettel had ruled that all of Mr. Burak's documents and conversations, as attorney for the Partnership, must be made open to Bleich and Donoghue, who were members of the Partnership at the time. Actually, this letter was produced by Mr. Burak together with a number of other papers from his file, and it obviously escaped the notice of the adversaries, who were visibly shocked when it was offered in evidence at the trial. Mr. Kayne, after some hesitation, said he would

not deny his signature. The lawyer for Mr. Risher said Risher had no copy in his files and had not turned over a copy to him (A2152). But later Risher testified about this letter at length (A2959-A2971).

On February 11, 1971 all the warrants held in the partnership name, including Gross' were taken by the Corporation under the color of the Transfer Agreement. Later the Corporation made a profit of $150,000 on the NCSS warrants and $262,000 on the Geon, plus $60,000 for giving up a right regarding the next Geon underwriting (A2975-81).

Judge Owen found that Gross' securities were "purloined" and wilfully converted (P533).

Persky's Motivation with regard to the Conspiracy

The Finley Kumble brief argues that Persky had no motivation in connection with the conspiracy other than the usual lawyer's motivation to have a good client, and that he had no relationship to the transaction other than as a lawyer. This argument does not square with the Court's findings on undisputed facts.

Persky admitted that he was on a contingent fee arrangement with the promoters of the New Corporation. If no deal went through for their acquisition of the Newburger, Loeb business he would receive no fee. (The Record establishes that from the beginning of December until February 11, when the deal finally closed, Persky and the subordinates of Finley Kumble invested tremendous time and effort in the transaction). Finley Kumble admitted that it received a fee after the deal closed, but somehow

Finley Kumble never was able to reveal to the Court, after repeated requests, how large that contingent fee turned out to be (A1283-1284).

Presumably, if Finley Kumble could not find out the size of the fee it got, the Corporation would be able to find out the size of the fee it paid. Risher and his attorney agreed to do so (A1284), but, somehow it also turned out to be impossible to get this simple fact from the records of the Corporation, as Risher later said (A2846). Judge Owen who had an extensive familiarity with the situation after a seven week trial found that the amount of the fee was withheld because it "was embarrassingly large" (P532).

Persky had other substantial links to the success of the Transfer Agreement. He got a block of shares of capital stock of the New Corporation (A1175-1177). He said this was part of his fee, and was agreed to after the closing. Persky was also the finder of Alex Aixala, whom he brought into the picture with new capital. Besides representing the New Corporation and its promoters at the Closing and acting as special counsel for the partnership, Persky acted as attorney in law and in fact to make the deal with absolute carte blanche from Aixala (A2716). Aixala testified that he trusted Persky to make the best deal he could for him, and that Persky did not reveal that he also represented the New Corporation and its promoters (A2714).

Some of Aixala's Bacardi stock had to be released from a pledge before it could be delivered at the Closing. Persky arranged a loan of substitute stock for this purpose to be made by a trust managed by another Finley Kumble partner (A1218-19). Cash had to be

advanced as interest on this loan; Persky advanced it out of his own funds (A1219). It would be hard to deliberately weave a more tangled web of conflicting interests, and every strand motivated Persky to complete the transaction.

The Destruction of Gross' Employment with Rafkind & Co.

The Trial Court found that in order to "club" Gross into submission to the Transfer Agreement the conspirators destroyed Gross' employment as a trader with Rafkind & Co.. They did this through threatening litigation under a restrictive covenant contained in the Partnership Agreement, although Gross' proposed employment could not in any way injure the economic interests of the partnership. The facts with regard to this matter are set forth in the Cross-Appeal, Point V, infra..

The Kayne-Sloane litigations against Gross

On January 23, 1971 Kayne called Gross and arranged a meeting. Kayne said he wanted Gross to withdraw his objections to the proposed deal. He said the deal would go through with or without the consent of Mrs. Donoghue. He said he was preparing lawsuits against Gross in California, but would not file them if Gross went along with the deal (A2347). Gross refused to consent to the deal because he was convinced that he and all others having capital in the firm would get paid out in the event of a liquidation (A2348).

On February 8, 1971 Gross was served with a summons and complaint in the suit brought by Kayne and Sloane in the

United States District Court, Central District, California. The complaint alleged that Gross had induced Kayne and Sloane to invest $50,000 each in the Newburger Loeb partnership by false representations, had mismanaged the assets of the partnership, had not used sound judgment, etc. The complaint demanded damages in the amount of $3,100,000 (E738).

The District Court in California dismissed some of the causes of action of the Kayne-Sloane complaint and stayed the others on the ground that they must be arbitrated (E745). The remaining claims of Kayne and Sloane were then arbitrated at length before a New York Stock Exchange Panel, which dismissed all of the claims and assessed all of the costs against Kayne and Sloane (E722).

With one major difference, the charges made against Gross in the California complaint were strikingly similar to those made by Kayne in August, 1970, in his "White Paper" ostentatiously read out in the presence of a Court Reporter.* The major difference was the target of the accusations. In August, Kayne did not yet know which of the partners would have to be coerced and threatened into going along with his takeover plans. So at that time, as Kayne admitted, these accusations were not aimed at Gross but were aimed generally at all the members of the executive committee, and all of the other members of the Partnership (A3555-3556). Kayne admitted that reservation of his rights against all partners was a "recurring theme" of his.

Judge Owen found that the Kayne-Sloane litigation

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* See page 10, supra.

was brought as part of the conspiracy to threaten and injure Gross with baseless litigations (P519, 521, 527).

Events Subsequent to the Transfer Agreement

About a year after the closing of the Transfer Agreement, Kayne and Muh sold the stock in Newburger, Loeb & Co. Inc. which each had acquired for $10,000 under the Transwer Agreement, receiving $400,000 each. Sloane and Berkowitz, who had fewer shares, sold at the same price per share.

About a year and a half after execution of the Transfer Agreement, Mr. Risher and others submitted affidavits to Judge Ward in which they stated the Corporation was doing very well and there would be no problem with regard to paying out Gross, Bleich and Donoghue should they prevail in the litigation (P206, 265). Apparently impressed by these assurances, Judge Ward refused to nullify the transaction and appoint a receiver for the assets, despite the fact that he found that the sale of the partnership assets was unauthorized as a matter of law. Understandably, Judge Ward was reluctant to force liquidation of what was represented to be a very healthy business. He ruled that Gross, Bleich and Donoghue would be entitled to receive damages in the event that they overcame the various claims against them.

A few years later the Corporation became insolvent, and it has been languishing in an inactive state in the Bankruptcy Court. The passage of time has proved that the judgments made by Gross about the merits of the deal were correct. The Limited

Partners who exchanged their claims against the partners for securities of the New Corporation received two years interest and not a penny of their principal (P3002-3004). As the Trial Court found, Gross, Bleich, Donoghue and the other Limited Partners could have been paid in full if the Partnership had been liquidated in February 1971 (P530). Instead, the assets turned over to the New Team's corporation, including the million dollars received from deficit General Partners, are now unavailable.

POINT I

THE TRIAL COURT PROPERLY FOUND THAT APPELLANTS CARRIED OUT A COMMON PLAN AND COURSE OF ACTION WHICH CONSTITUTED A TORTIOUS CONSPIRACY IN BREACH OF FIDUCIARY OBLIGATIONS OWED BY THEM TO GROSS, BLEICH AND DONOGHUE

A. The gravamen of the conspiracy is breach of fiduciary duties -- not common law torts such as abuse of process, fraud and deceit, or duress.

We think it entirely remarkable that the leading briefs of appellants do not discuss the subject of breach of fiduciary duty. The gravamen of the conspiracy counterclaim was clearly stated as breach of fiduciary duty, and the Trial Court found appellants guilty of carrying out such a conspiracy. Yet appellants have framed their briefs as though this issue did not exist, and have argued instead about common law torts which we did not urge below and which were not relied upon by the Trial Court.

Many of our adversaries' arguments are erroneous in any event, but more important, their arguments and cases do not apply to a fiduciary situation. The essence of this case is that there

are many things permitted in an arm's-length situation which are illegal and fraudulent in a fiduciary context. Indeed, there are many things which are socially desirable and encouraged in an arm's-length situation which are unlawful in a fiduciary situation.

In the classic case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928), partners owned a lease on the Salmon Towers, a building which still stands on 42nd Street as a monument to Jurisprudence. The owner of the building approached Salmon and offered him a new lease for the subsequent period, together with a lease on adjoining property. Salmon did not advise his partner Meinhard of this opportunity, but negotiated a new lease in favor of a corporation owned wholly by him. The Court condemned this behavior on the part of a fiduciary, in an oft-quoted declaration by Judge Cardozo that the ordinary law, applicable among strangers, does not apply to fiduciary situations:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (Wendt v. Fischer, 243 N.Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." (249 N.Y. at 464)

In the situation of Meinhard v. Salmon, supra, it would not be relevant to cite cases showing that Salmon's conduct did not amount to unfair competition, nor would it be germane to

argue that his failure of disclosure did not amount to a fraudulent misrepresentation or concealment. A different standard -- good faith -- is required in fiduciary relations.

This guiding principle, which our adversaries' briefs submerge, is illuminated by two recent leading cases of the N.Y. Court of Appeals: Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E. 2d 237 (1954); Rampell v Hunter, 3 N.Y. 2d 369, 144 N.E. 2d 371, 165 N.Y.S. 2d 475 (1957).

The Duane Jones Corporation was an advertising agency principally owned by Mr. Jones. A group of employees got together with some ex-employees and formed a new corporation to go into the advertising agency business, and then approached the Duane Jones customers to woo them away. After they had some success in this direction, two of the individual defendants approached Mr. Jones and told him that if he did not sell the business to their group, they would resign en masse and that they would take with them all of the customers they could. Negotiations followed, but when no agreement could be reached, the employees, including directors and officers of the Duane Jones Corporation, resigned their offices, and later resigned their employment, and went to work for the new corporation, to which they managed to bring most of the old customers.

Defendants in Duane Jones pointed out that the law favors competition -- even fierce competition -- between those vying for business in the market place. The defendants argued that their conduct did not amount to unfair competition, and they argued that no false or fraudulent means were used in wooing away the former employees or customers of the plaintiff. They

argued, further, that since each of the defendants had the right to compete, and had the right to resign from the business, and had the right to hire employees, nothing unlawful was done which could be the subject of a conspiracy. It was also undisputed that Mr. Jones had failed to yield to the threats which had been made to him, so that it was apparent that no harm had been done by such threats.

The Court of Appeals rejected these arguments, and upheld defendants' liability on the grounds that they carried out a conspiracy in violation of their fiduciary obligations to the plaintiff. The core of decision was stated by the Court, 306 N.Y. at 188, 189, as follows:

> "The inferences reasonably to be drawn from the record justify the conclusion -- reached by the jury and by a majority of the Appellate Division -- that the individual defendants-appellants, while employees of plaintiff corporation, determined upon a course of conduct which, when subsequently carried out, resulted in benefit to themselves through destruction of plaintiff's business, in violation of the fiduciary duties of good faith and fair dealing imposed on defendants by their close relationship with plaintiff corporation."

The gravamen of the Duane Jones decision is simply this: Fiduciaries owe an obligation of good faith. If persons in that position jointly embark upon a course of conduct to violate that duty of good faith, they are guilty of a conspiracy, and liable for all damages caused by it. The acts which fiduciaries perform are not to be judged by rules of law applicable to persons dealing at arm's-length.

The same lesson is taught by Rampell v. Hyster, supra. The plaintiff, Rampell, was a distributor under a written contract

with defendant Hyster, a manufacturer of forklifts and similar equipment. Other defendants were plaintiff's salesman and Hyster's District Manager. Rampell charged, in the First Cause of Action, that Hyster wrongfully induced Rampell's employees to leave Rampell's employment. Hyster argued that the employments in question were not under any agreement for a term, but were merely at-will, and as to such employment the law gave them the right to hire away such employees, provided that the hiring had a motive of gain or profit and not malice. The Court of Appeals held that the ordinary rule, which would permit such hiring away, was not applicable in the instant case because a fidicuary relationship existed, saying, at 3 N.Y.2d 376:

> "Absent the relation of confidence between the parties, the complaint would not state facts sufficient to constitute a cause of action (Beardsley v. Kilmer, 236 N.Y. 80; Reinforce, Inc. v. Birney, 308 N.Y. 164, 169-170; Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79; American Guild of Musical Artists v. Petrillo, 286 N.Y. 226, 231; Opera on Tour v. Weber, 285 N.Y. 348, 355-356). Here, however, there are a number of provisions in the contract which indicate the existence of this relation..." [Emphasis added]

In the Second Cause of Action considered by the Court of Appeals, Rampell claimed that a former employee, Chester, was guilty of wrongdoing in connection with certain acts, most of which would have been perfectly proper if committed by a stranger. The Court agreed with plaintiff, holding that the acts violated the employees' fiduciary duty of fidelity toward plaintiff. It is noteworthy that the Court did not consider each of these acts separately or in vacuo, but considered them all together in a realistic recognition that they were performed as part of a unified plan. The pertinent portion of the Court's opinion reads as follows:

"Plaintiff alleges in its second cause of action that its employee Chester, though bound by the terms of his employment agreement with plaintiff 'to give his "time and services exclusively to selling the products sold or distributed" by the plaintiff', committed a number of acts inconsistent with the duty of fidelity that he owed to plaintiff in that he (1) negotiated with Hyster for a dealership in competition with plaintiff; (2) defamed plaintiff to Hyster; (3) induced Shoriak, O'Neill and Koziara to terminate their employment agreements with plaintiff; (4) induced Hyster to terminate its distributorship agreement with plaintiff, and (5) aided Hyster in its plan to place itself in a favored position for the termination of plaintiff's distributorship, without a break in the sales representation, for the purpose of injuring plaintiff and destroying its business.

"All of the Judges below found that these allegations sufficiently stated facts constituting a cause of action by plaintiff against Chester, and we agree. It is perfectly clear that the acts alleged were inconsistent with Chester's duty of fidelity toward plaintiff (Duane Jones Co. v. Burke, 306 N.Y. 172, 187-188; Lamdin v. Broadway Surface Adv. Co., 272 N.Y. 133, 138; 4 Willison on Contracts [rev. ed.] §1022." (3 N.Y. 2d at 377)

In dealings between partners, the fiduciary standard of good faith requires that any partner or a majority of partners " ... must refrain from taking advantage of another partner by the slightest misrepresentation, concealment, threat or adverse pressure of any kind." (60 Am. Jur. 2d, Partnership, §126)

Furthermore, the obligation of perfect fairness and good faith is not confined to the period of technical existence of the partnership, but applies in all stages thereof: R.C. Gluck & Co. v. Tankel, 24 Misc. 2d 841, 199 N.Y.S. 2d 12, (Sup. Ct. 1960), aff'd 12 App. Div. 2d 339, 211 N.Y.S. 2d 602 (1st Dept. 1961). The fiduciary duty exists after execution of an agreement to dissolve, at least until complete dissolution and liquidation of partnership assets has been effected: Pearlstein v. Baff,

60 N.Y.S. 2d 713 (Sup. Ct. 1945), rev'd on other grounds 270 App. Div. 1043, 63 N.Y.S. 2d 710, modified 271 App. Div. 834, 65 N.Y.S. 2d 851 (2nd Dept. 1941), aff'd 296 N.Y. 881, 72 N.E. 2d 613. That the partnership is one which a partner may terminate at will does not diminish the fiduciary duty of undeviating devotion. Boxill v. Boxill, 201 Misc. 386, 111 N.Y.S. 2d 33,37 (Sup. Ct. 1952).

The fact that Gross' withdrawal from the partnership had technically become effective did not end the fiduciary obligation owed to him. The Partnership still held his capital, and until the end of the Calendar Year 1970 Gross would continue to share in an allocated portion of the profits and losses, under the withdrawal formula fixed by Paragraph 8.1 of the Partnership Agreement (E441,2). Gross also had a continuing liability as between himself and the firm's creditors for all liabilities contracted by the Partnership prior to the effective date of his withdrawal. Bleich and Donoghue, of course, still held full status as Limited Partners. In the Boxill case, supra, the Court said:

> "Until, at least, the relationship is at a definitive factual and juridical end, the legal immunity of the beneficiary from the subtle or open attack by his assumed protector must remain impregnable. In the matter of timing, therefore, there may well be an appropriate line of demarcation between the voluntary termination of revocable relationship and the judicial imposition of a burdensome loyalty resulting from the continued existence of that relationship. I hold that dissolution must precede active self-interest, not vice-versa." (111 N.Y.S 2d at 38)

Judge Owen found that Persky and the other appellants were guilty of a course of conduct carried out in bad faith to

coerce Gross, Bleich and Donoghue to consent to the Transfer Agreement, or alternatively, to carry out the Transfer Agreement in violation of their rights as partners, and to avoid paying over to them their respective partnership interests. Some of the acts performed pursuant to this conspiracy were tortious, even standing alone; some, indeed, were criminal, in our opinion. However, these acts should not be weighed separately, but together, as steps in a common plan in violation of fiduciary obligations owed to Gross, Bleich and Donoghue.

In our section on facts, supra, we discuss the following steps or acts which Judge Owen found were performed in furtherance of the conspiracy:

1. Persky and the other counterclaim defendants acted in bad faith towards Gross, Bleich and Donoghue in connection with the settlement of the Buckley arbitration, a piece of partnership business, deliberately manipulating that settlement in such a way as to create a baseless claim to be used as a weapon against them (P519, 520).

2. Persky, the General Partners and the New Team defamed Gross to the Limited Partners, the Subordinated Lenders and to the attorneys representing both those groups for the purpose of persuading them to override Gross' opposition to the proposed Transfer Agreement, and for the purpose of convincing them that if the deal went through no money would have to be paid over to Gross, Bleich or Donoghue.

3. The General Partners, the New Team and the Corporation wrongfully executed the Transfer Agreement without the authority required by 598 of the Partnership Law.

4. The New Team wrongfully induced the General Partners to approve the Transfer Agreement by giving them "special considerations" in the form of foregiveness of debt. The General Partners wrongfully demanded and accepted such "special considerations" (P517, 523).

5. Persky issued a dishonest opinion letter which induced the Limited Partners and Subordinated Lenders to execute the Transfer Agreement in violation of the rights of Gross, Bleich and Donoghue (P524).

6. The conspirators purloined and converted Gross' "in-kind" securities (P518).

7. The conspirators agreed that Gross, Bleich and Donoghue's capital would not be repaid to them, but would be retained by means of "baseless and fraudulent lawsuits" (P532) to be dragged out for years in expensive proceedings, to-wit: (a) The Buckley claim; (b) The Kayne and Sloane litigation; (c) Numerous claims such as those set forth in the six counterclaims pleaded in the Reply.

8. They gave misinformation to Peat Marwick to create a misleading balance sheet (P535) which undervalued Gross' interest in the Partnership.

9. They maliciously destroyed Gross' employment opportunity with Rafkind to club him into submission (P521), or to render him economically impotent to litigate against them.

Each of these acts violates the duty of good faith owed to Gross, Bleich and Donoghue, by reason of the partnership relationship. Liability for such a conspiracy is not limited

to the faithless partners, but extends to any agent, including attorneys, or other person who helps in the commission of the wrongful act.

There is no merit to appellants' claim that the counterclaims are insufficient and premature because they sound in malicious prosecution or abuse of process. This argument amounts to an attack upon a straw man erected by appellants. Malicious prosecution does not form the gravamen of the counterclaims or of Judge Owen's decision.

The baseless and fraudulent litigations were only one step in the overall conspiracy to injure defendants, a conspiracy which embraced numerous additional wrongs. It is well settled that a larger conspiracy, in which baseless and fraudulent litigation is only one facet, is not subject to the limiting rules applicable to malicious prosecution: Munson Lines v. Green, 6 F.R.D 14 (S.D.N.Y. 1946) appeal dismissed 165 F. 2d 321 (2d Cir. 1948); J.J. Theatre v. V.R.O.K. 96 N.Y.S. 2d 271, (Sup. Ct. 1950); Schauder v. Weiss, 88 N.Y.S. 2d 317 (Sup. Ct. 1949) aff'd. 276 App. Div. 967, 94 N.Y.S. 2d 748 (2d Dept. 1950); motion for leave to appeal denied, 276 App. Div. 1022, 95 N.Y.S. 2d 914; Herbert Products v. Oxy-Dri Sprayer Corp. 1 Misc. 2d 71, 145 N.Y.S. 2d 168, (Sup. Ct. 1955); Conwell v. Partow, 18 App. Div. 2d 836, 238 N.Y.S. 2d 90 (2nd Dept. 1963).

In the following cases counterclaims were upheld which included the claim that the main action was part of a larger conspiracy: United Artists Corp. v. Masterpiece Productions, 221 F. 2d 213 (2d Cir. 1955); Herbert Products v. Oxy-Dri Sprayer Corp., supra; J.J. Theatre v. V.R.O.K. Co., supra.

The decision of this Court in United Artists Corp. v. Masterpiece Productions, supra, is very closely in point. In United Artists plaintiff sued for copyright infringement and unfair trade practices regarding motion picture television rights. The defendant counterclaimed pleading a conspiracy and bringing in additional parties on counterclaims as alleged conspirators with the plaintiff. Certain additional defendants, Benjamin, Krim and Peyser, had at one time been attorneys for defendants and the counterclaim alleged that these lawyers were participating in the conspiracy to deprive the defendants of certain valuable rights. It was further alleged that the very bringing of the action by plaintiff was part of the conspiracy alleged in the counterclaim. As one defense to the complaint, the defendants pleaded estoppel based on the prior relationship with the conspiring attorneys.

This Court held that the counterclaim was logically related to the complaint and that ancillary jurisdiction existed with regard to the counterclaim against all of the additional defendants, as well as the plaintiff. The United Artists case has been cited approvingly in many subsequent cases, including Baker v. Gold Seal Records, 417 U.S. 467, 469, n. 1 (1974).

Cases abound which hold that sham and vexatious litigations are actionable when brought as part of a larger conspiracy to injure plaintiffs under the anti-trust laws: Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965) (Counterclaim upheld). Hospital Building Co. v. Trustees of the Rex Hospital et al.; - U.S. - , 48 L. Ed. 2d 338 (1976) (Conspiracy to block expansion of plaintiff hospital by

by a series of acts and bad faith tactics " ... including the bringing of frivolous litigation, to block the implementation of the expansion" (48 L. Ed. 2d at 342); Mach-Tronics Inc. v. Zirpoli, 316 F. 2d 820(9th Cir. 1963, (State Court actions part of conspiracy); Lektro Vend Corp. v. Vendo Corp., 403 F.S. 527 (N.D. Ill. 1975) aff'd - F. 2d- , 1976-1 Trade Cas. 60,919, (7th Cir. 1976), cert. granted 50 L.Ed.2d 84; Dairy Foods, Inc. v. Dairy Maid Products Cooperative, 297 F. 2d 805 (7th Cir, 1961).

It seems to us that appellants argument, if accepted by the courts, would lead to the incongruous result of allowing the addition of baseless litigation as one facet of a conspiracy to immunize the entire conspiracy from judicial redress until the termination of the first baseless action. Under the rule suggested by appellants, the wrongdoers are saved by the fact that they conspired to bring a baseless and fraudulent complaint, as this, they argue, makes the counterclaims premature with regard to the entire conspiracy. On the other hand, absent the fraudulent litigation, the judgment would be valid as to all the other facets of the conspiracy. Certainly no such result is thinkable, and appellants have produced no authority to sustain their position.

B. Our adversaries misunderstand the New York law regarding civil conspiracies. Where a tort is committed pursuant to a common plan, each person who conspires or assists therein is liable for the whole, and is chargeable with the acts and declarations of the other conspirators.

Finley Kumble Point II, and Kayne Point I proffer an erroneous understanding of the New York law of civil conspiracy.

It is absolutely true that under New York law there is no substantive tort of conspiracy. However, this rule means only that plotting and planning of themselves do not constitute a tort if the schemes are never carried out by the commission of some wrongful overt act. This rule does not mean, as appellants contend, that even when there has been an actual commission of an overt act, each conspirator is only chargeable with torts personally committed by him. The contrary is true. Given the commission of a tortious act, New York law affixes liability upon each person who conspired and assisted toward the torticus purpose, and holds them guilty as joint tort feasors, one with another, and each may be charged with the acts and declarations of the others.

In Green v. Davies, 182 N.Y. 499, 504, 75 N.E. 536 (1905) the court said:

> "The allegation and proof of a conspiracy in an action of this character is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his conspirators, where otherwise he could not have been implicated."

In Werbelovsky v. Rosen, et al., 260 App. Div. 222, 21 N.Y.S. 2d 88 (2nd Dept. 1940), the court said:

> "It is true that a 'mere conspiracy to commit a fraud is never of itself a cause of action.' Green v. Davies, 182 N.Y. 499, 504, 75 N.E. 536, 537, 3 Ann. Cas. 310; Miller v. Spitzer, 224 App. Div. 39, 229, N.Y.S. 526. The cases cited have no application, for admittedly in the series of torts alleged the appealing defendants were participants. It is the wrongful act committed by the conspirators, resulting in injury to the plaintiff's assignor, which alone gives rise to the cause of action. Miller v. Spitzer,

supra. The gist of all civil action for conspiracy is damage; it is only important to join all defendants to hold them responsible for each other's acts in furtherance of the conspiracy. Von Au v. Magenheimer, 126 App. Div. 257, 110 N.Y.S. 629, affirmed, 196 N.Y. 510, 89 N.E. 1114." (21 N.Y.S. 2d at 92)

In Goldstein v. Siegel, 19 App. Div. 2nd 489, 244 N.Y.S. 2d 378, 382 (1st Dept. 1963) Judge Breitel said:

"The allegation of conspiracy carries no greater burden, but also no less, than to assert adequately common action for a common purpose by common agreement or understanding among a group, from which common responsibility derives."

Since Finley Kumble, Kayne and certain other appellants based their major argument on this misconception of New York law, we cite more precedents than otherwise might be appropriate: Original Ballet Russe v. Ballet Theatre, 133 F. 2d 187 (2d Cir. 1943); Bedard v. La Bier, 20 Misc. 2d 614, 194 N.Y.S. 2d 216 (Sup. Ct. 1959); Taller & Cooper Inc. v. The Neptune Meter Company, 8 Misc. 2d 107, 166 N.Y.S. 2d 693 (Sup. Ct. 1957); Hijos De Daniel Espuny, S.A.v. Victor M. Calderon Co., 9 Misc. 2d 983, 168 N.Y.S. 2d 333 (Sup. Ct. 1957), aff'd 6 App. Div. 2d 697, 174 N.Y.S. 2d 891 (2d Dept. 1958).

A portion of the opinion of the Court of Appeals in Rampell v. Hyster, supra, is precisely in point to refute appellants' argument that under the law of New York no conspirator may be held except for his separate torts. In Rampell, defendants moved to strike out the fourth Cause of Action, claiming that it did not allege any tortious act committed pursuant to the plan. The court held that a breach of fidelity was committed by one of

the conspirators, and thus the cause of action was sufficient against all of them, saying:

> "Defendants here claim that the cause of action is insufficiently stated in that it does not set forth any tortious act committed pursuant to the alleged plan. As has been stated above - and certainly with regard to the breach of fidelity by Chester - a tortious act was committed pursuant to the plan. The case is clearly within the rule of Duane Jones Co. v. Burke (306 N.Y. 172, 117 N.E. 2d 237, supra) in which we upheld a judgment based on a conspiracy among certain employees to destroy their employer's advertising agency by soliciting their clients and key personnel to transfer their business relations from their employer to a new agency they were to set up". (3 N.Y. 2d at 379)

All persons who participate in the wrongdoing are joint tort-feasors, and each is liable for the full amount of the damages. It is not necessary for the Court to find that any person profited personally from the breach of fiduciary duties in order to find him liable for the wrongdoing. It is enough that a person knew of the relationship of trust and voluntarily participated in the conspiracy which violated it. In Weschler v. Bowman, 285 N.Y. 284, 34 N.E. 2d 322 (1941) modified 286 N.Y. 582, 35 N.E. 2d 930, the Court said, at page 291:

> "Any one who knowingly participates with a fiduciary in a breach of trust is liable for the full amount of the damage caused thereby to the cestuis que trust. (Jacobellis v. Prudential Ice & Coal Corp., 244 App. Div. 255; aff'd 269 N.Y. 632; Mack v. Latta, 178 N.Y. 525, 532; Anderson v. Daley, 38 App. Div. 505, appeal dismissed 159 N.Y. 146."

See also 5 Scott on Trusts, §502 (3d Ed 1967) and cases there cited. 5 Scott on Trusts, §506 (3d Ed 1967), p. 3568, states:

> "Where a person in a fiduciary relation to another violates his duty as fiduciary, a third person who participates in the violation of duty is liable to the beneficiary".

Thus there is no merit whatsoever to Finley Kumble's legal argument that it can be held liable only for separate torts committed by it, and cannot be held liable as a joint tortfeasor for the entire conspiracy, which the trial court found, to injure Gross, Bleich and Donoghue. In order to escape, Finley Kumble would be required to show this Court that Judge Owen clearly erred in finding that there was a common plan in breach of fiduciary duties to damage Gross, Bleich and Donoghue, or clearly erred in finding that Finley Kumble played any role whatsoever either in planning or carrying out that common plan.

Finley Kumble's argument that it may not be held liable for anything other than its separate torts is an effort artificially to separate and fragment the steps of the conspiracy so as to view each action of each conspirator in artificial isolation. This is the opposite from the realistic approach which the Courts have always taken regarding common plans.

An analogy may help to make our point. In a case involving a conspiracy to murder (murder is also a tort), the defendant might argue: "I only gave him a rifle - there is nothing illegal in making a gift of a rifle." Another defendant

might argue: "I only drove him to the victim's home - there is nothing illegal in giving a man a ride." And the killer himself might argue: "All I did is pull a trigger - there is nothing illegal about pulling a trigger." We submit that it is beside the point to examine the law with regard to the right to give the gift of a rifle; the right to give an automobile ride and the right to pull a trigger. All of the acts may be legal in vacuo, but completely wrongful as steps in a common plan of murder.

In pursuit of this policy of fragmentation, Finley Kumble argues that it cannot be held liable for the acts of the other conspirators. Other counterclaim defendants argue that they cannot be held liable for relying on Finley Kumble's advice. Still other counterclaim defendants argue that though Finley Kumble were their lawyers, they cannot be held liable for Finley Kumble's acts. All appellants together ignore the finding of Judge Owen that they all acted in concert, knowingly, to carry out an overall tortious plan, and that each one knew what the others were doing.

There is no merit to Finley Kumble's argument that it is immune from liability in this case under the rule that an Attorney is privileged to act on behalf of his client without fear of liability to a third party (Finley Kumble, Point III). The argument blinds itself to the findings by Judge Owen that Persky was at the heart of the conspiracy, (P532) and that he

was not only counsel to the New Team, but one of its actors and spokesmen in carrying out the conspiracy (P534). A lawyer who engages in a tortious conspiracy has no immunity by reason of his profession, and is guilty as a co-conspirator. 7 Corpus Juris Secundum, Attorney And Client, §52, p. 834, states the rule as follows:

> "An attorney is personally liable to a third person sustaining injury in consequence of his wrongful acts or improper exercise of authority where he has been guilty of fraud or collusion, or of a malicious or tortious act.
>
> "While an attorney is not liable to a third person for acts performed in good faith, and mere negligence on the part of an attorney is insufficient to give a right of action to a third party injured thereby, an attorney is personally liable to a third party who sustains an injury in consequence of his wrongful act or improper exercise of authority where the attorney has been guilty of fraud or collusion, or of a malicious or tortious act ..."

The rule stated above was quoted approvingly and followed in Kasen v. Morrell, 18 Misc. 2d 158, 183 N.Y.S.2d 928 (Sup. Ct. 1959). In Dallas v. Fassnacht, 42 N.Y.S.2d 415 (Sup. Ct. 1943), the Court expressly recognized that a lawyer may be found liable for participating with his client in a wrongful conspiracy whenever he does something tortious in character or beyond the scope of his honorable employment.

In Steinberg v. Guild, 22 App.Div. 2d 776, 254 N.Y.S. 2d 7 (1st Dept. 1964), affirmed, 16 N.Y.2d 789, 209 N.E.2d 886, 262 N.Y.S.2d 714, a complaint was held sufficient against an attorney based on the allegation that the attorney conspired

with his clients to pre-date documents and to omit facts from an investment brochure. There was no allegation that the attorney was a principal in the transaction or engaged in the conspiracy other than as an attorney. See also Meneri v. Amodeo, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (Sup. Ct. 1963).

None of the cases cited in the Finley Kumble brief is apposite, because none of them applies to the situation where the Court has found the attorney guilty of participating in a wrongful conspiracy.

The case most strongly relied upon by Finley Kumble is D. & C. Textile Corp. v. Rudin, 41 Misc. 2d 916, 246 N.Y.S. 2d 613 (Sup. Ct. 1964). In that case an action against lawyers was dismissed on the ground that the attorneys were privileged to advise their clients, and the attorney had done nothing which went beyond the giving of advice as to the legal consequence of breach of agreement.

It is hardly germane in the instant case to talk about the lawyers' right to give honest advice. On overwhelming evidence, the trial court found that Persky was at the heart of the conspiracy and committed numerous overt acts towards carrying it out. Some of these overt acts would be separately cognizable as tortious, even apart from their role as steps in a conspiracy: Persky's dishonest manipulation of the Buckley settlement to create a claim to be used against Gross, Bleich and Donoghue; Persky's defamation of Gross; Persky's issuance

of a knowingly false opinion letter which was an essential document to the wrongful transfer of partnership assets; Persky's instigation of litigations which the Court found to be "baseless and fraudulent." Furthermore, the threats uttered by Persky, if not separately tortious, certainly provide evidence of Persky's participation in the conspiracy, and evidence of the wrongful intent which accompanied the subsequent carrying out of the threats.

The wrongfulness of Persky's acts is aggravated by the fact that they were directed against Limited Partners and a partner in withdrawal of a partnership which Persky represented as attorney. It is shocking to claim that Persky and Finley Kumble are immune from the consequences of their wrongdoing because of their status as attorneys. In a situation such as this they have, if anything, a higher degree of responsibility, precisely by reason of the status of attorneys, and of the probity which it demands.

Nor is there the slightest legal or factual validity to Finley Kumble's argument that lawyers cannot be held as conspirators where they have no personal interest in the transaction. Personal interest may prove motive, but it is certainly not a prerequisite to conspiratorial liability. Knowing participation is all that is required for complicity. Further, the Court specifically found that Persky was motivated to carry

out the conspiracy in order to receive a legal fee so "embarrasingly large" that the records of it vanished (P532). If the deal had not closed there would have been no fee whatsoever (A1211). Persky was further motivated, the Court found, by the hope that the new corporation funded with the assets wrongfully transferred from the Partnership, would be a good client (P525).

C. Execution of the Transfer Agreement was unlawful for two separate reasons: 1) it was unauthorized under §98 of the Partnership Law; 2) it was induced by fraudulent special considerations paid to the General Partners.

1) Each appellant played a role as signatory or otherwise, in the execution of the Transfer Agreement on February 11, 1971.

The Transfer Agreement is unauthorized because it was not consented to by all of the General and Limited Partners as required by §98 of the New York Partnership Law, 38 McKinney's Consolidated Laws of New York, page 142, which provides in part as follows:

* * *

> (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilties of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to
>
> (a) Do any act in contravention of the certificate.
>
> (b) Do any act which would make it impossible to carry on the ordinary business of the partnership.
>
> * * *
>
> (Underlining added)

The Transfer Agreement which sold all of the assets and properties of the Partnership to a corporation having different equity ownership was an act which made it impossible for the Partnership to carry on its ordinary business, and in fact marked the end of all the business activities of the Partnership. It is undisputed that Mabel Bleich and Jeanne Donoghue went on record that they refused to consent to the Transfer Agreement. They were Limited Partners in full standing at the time. Though no further objections were required under §98 of the Partnership Law to block the Agreement, it is noteworthy that there were also seven "former or present 1970 General Partners" who did not sign the Agreement (Peat, Marwick, Mitchell & Co. Statement, Note L (E954). Of course, one of the partners in the process of withdrawal who placed an objection on record was Charles Gross.

The adversaries seem to argue that the requirement of the consent of all the Limited Partners is not applicable in this case because the proposed agreement was better for the Partnership than the liquidation or dissolution which would otherwise occur. We believe this agreement is invalid because it was not for anybody other than the individual partners to decide whether they preferred the consequences of the Transfer Agreement or the consequences which might flow without it. The statutory prohibition against this kind of transaction is flat and absolute unless consent is obtained from all of the partners. The statutory prohibition is not related to advisability or necessity, except as determined by the unanimous consent of the partners.

The adversaries also argue that sale of the assets through the Transfer Agreement was permissible because the end of the business was in any event imminent. As Judge Ward pointed out, this argument is also fallacious, for the dismemberment of the Partnership under the Transfer Agreement was entirely different from a liquidation of the partnership business following a termination or the Agreement. The Partners claimed the right to keep the capital of all of the former partners for the period provided in the Partnership Agreement, and no liquidation and dissolution of the Partnership was carried out as provided in paragraph IX of the Limited Partnership Agreement. It is noteworthy that in any liquidation under paragraph IX, no forgiveness of any portion of any Partner's indebtedness would be permissible, and this was a principal provision of the Transfer Agreement.

We also respectfully refer the Court to Judge Ward's Opinion on this question in 1973 (P444), Judge Owen's Opinion (P514) and to the legal memorandum on the Rosenman firm, on which that firm based its refusal to give an opinion of proper authorization (E803-808). See also, cases cited p.75, infra.

2) Judge Owen found that the General Partners ". . . were 'induced' to go along" with the Transfer Agreement by the forgiveness of indebtedness, aggregating more than $500,000 (P531).

No Partner took the stand to deny this motivation for his approval of the deal, and in deposition Andrew Newburger testified that the General Partners privately agreed among themselves that they would bargain with the New Team to force forgiveness of as much debt as possible as a condition of their consent to the Agreement (A2632, 2633).

Not to mince words, the forgiveness of indebtedness is the equivalent of a payment or a gift, and in the context of this transaction, constituted the equivalent of a bribe. The Partners who purported to authorize the Transfer Agreement were acting in a fiduciary capacity towards Gross, who was a partner in the process of withdrawal, and toward Bleich and Donoghue, who were still Limited Partners. They purported to approve a transaction in which Gross' capital would be at the risk of the new corporation for the balance of the twelve month period beginning with the date of Gross' resignation from the firm. In exercising such a fiduciary power, presumably delegated by the Partnership Agreement, it is clear that no General Partner had the right to demand or receive any separate or personal benefit to himself: Wendt v. Fischer, 243 N.Y. 439, 154 N.E. 303 (1926); Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928); Munson v. Syracuse, Geneva & Corning Railroad Co., 103 N.Y. 58; Herlehy v. Ferguson, 47 App. Div. 237, 62 N.Y.S. 648 (4th Dept., 1900); May v. Hettrick Bros. Inc., 181 App. Div. 3, 167 N.Y.S. 966 (1st Dept. 1917),

aff'd 226 N.Y. 580, 123 N.E. 878; Executive Hotel Associates v. Elm Hotel Corporation, 41 Misc. 2d 354, 245 N.Y.S. 2d 929 (Civ. Ct. 1964), aff'd 43 Misc. 2d 1531, 250 N.Y.S.2d 351 (App. Term 1st Dep't 1964). In Meinhard v. Salmon, supra, Judge Cardozo said:

> "Salmon had put himself in a position in which thought of self was to be renounced, however hard the abnegation. He was much more than a coadventurer. He was a managing coadventurer (Clegg v. Edmondson, 8 D.M. & G. 787, 807). For him and for those like him, the rule of undivided loyalty is relentless and supreme (Wendt v. Fischer, supra; Munson v. Syracuse, etc., R.R. Co., 103 N.Y. 58, 74." (249 N.Y. at 468)

Executive Hotel Associates v. Elm Hotel Corporation, supra, is precisely in point. A general partner engaged in self-dealing, executed an assignment, which was of benefit to himself, and also served to make it impossible for the partnership to carry on its ordinary business. The Court summarily set aside the assignment as a nullity, relying upon Partnership Law §98, as well as upon the foregoing principles of fiduciary responsibility. See also Riviera Congress Associates v. Yassky, 48 Misc. 2d 282, 264 N.Y.S. 2d 624, modified on other grounds 25 A.D. 291, 268 N.Y.S. 2d 854, (1st Dep't 1969), modified and aff'd 18 N.Y. 2d 540. 223 N.E. 2d 876, 277 N.Y.S. 2d 386.

In using their powers to obtain special advantages for themselves, the General Partners violated their fiduciary duties. In inducing the General Partners to consent to the

Transfer Agreement through the proffer of these special advantages, the promoters of the new corporation knowingly induced the violation of fiduciary duties, and are equally guilty of fraud. Indeed, we think it clear that those who offered this bribe and those who received it are guilty of acts condemned by New York's criminal law in addition to being guilty of tort. New York State's commercial bribery law makes it illegal to confer any benefit upon a fiduciary with intent to influence his conduct, and makes it illegal for any fiduciary to accept any benefit upon an agreement or understanding that it will influence his conduct. N.Y. Penal Law, §§ 180.00 and 180.05.

As Judge Owen found, the corruption of the General Partners was a tortious step taken as part of the conspiracy. It was a causative factor in the wrongful transfer of the Partnership's assets under the purported authority of the Transfer Agreement. It was an act known to all the conspirators and performed pursuant to the common plan, for which they are all responsible.

Appellants argue that Gross does not have "standing" to complain that the Transfer Agreement was execution in violation of §98 of the Partnership Law, because his vote was not required by that Section. Their argument, even assuming it had merit, has no application to the separate ground of illegality - namely the corrupt inducement of the signatures of the general partners by the forgiveness of debt.

However, we believe there is no merit whatsoever to the "standing" argument, even in connection with the question

of §98. The argument that only those whose signatures were required may complain of an improper disposition of partnership assets misses the point entirely. §98 itself does not contain any prohibition, affix any penalty, or provide any remedy. The section merely declares the rights and powers of the partners. Thus, arguments based on "standing" under remedial statutes are inapposite.

Gross, Bleich and Donoghue do not, strictly speaking, complain of a statutory violation; rather they complain that the transfer of the partnership assets was made without proper authority, and therefore constituted a conversion of the assets. §98 merely serves to define the requisite authority. It does not follow at all that persons who do not have a vote in the matter in question have no standing to complain of a misapplication or conversion of partnership property. For example, limited partners ordinarily have no voice in the management of partnership business and have no vote in connection with any acts performed in the ordinary course of business. Yet Limited Partners certainly have standing to complain if the General Partners, through self-dealing or otherwise, engage in improper transactions: Millard v. Newmark Co., 24 App. Div. 2d 333, 266 N.Y.S. 2d 254 (1st Dep't 1966):

> "In Mannaberg v. Herbst, Sup., 45 N.Y.S. 2d 197, aff'd without op., 267 App. Div. 818, 47 N.Y.S. 2d 100, aff'd 293 N.Y. 657, 56 N.E. 2d 255, an action by one of four general partners against a third person for damages allegedly sustained by reason of the wrongdoing of such third person and one or more of the partners,

> it was pointed out 'that where one partner and a third person join in a fraudulent disposition of partnership property the wrong is done not to the firm but to each partner separately and that each not only may but must sue alone for such damage as he has sustained' (45 N.Y.S. 2d p. 199). It would seem that a limited partner should have no greater right in seeking redress than a general partner, i.e., by individual action. See also, Sweet v. Morrison et al., 103 N.Y. 235, 240, 8 N.E. 396, 397." (266 N.Y.S. 2d 254, 262)

An interest in the partnership capital exists regardless of a right to vote on the disposition of all or part of the property. It is the property interest -- and not the right to vote -- which supports the right to bring action against a conversion by the fiduciaries and others.

Appellants argue that they had the right to keep Gross' capital at the risk of the Partnership, or a successor partnership or firm for twelve months after the date of his withdrawal. Even if we assume that this provision applied to his "additional capital" under the terms of the Partnership Agreement, and not merely his "committed" capital, the right to keep Gross' capital can only be in favor of a properly constituted successor.

Apparently, appellants' argument of lack of standing is confined to Gross. They admit that Bleich and Donoghue, having a vote under §98, have "standing" with regard to the conversion of the Partnership's assets. It seems to us anomalous to argue that an unauthorized transfer of Partnership property, which admittedly embraced the capital of all these, gives rise to a cause of action on the part of Bleich and Donoghue, but not on the part of Gross.

Appellants' "standing" argument also blinds itself to the fact that the conversion of the partnership assets was but one step in the conspiracy to injure Mr. Gross with regard to his fiduciary rights in a partnership situation. The ultimate gravamen of the conspiracy was breach of fiduciary duties which were unquestionably owed to Gross, a partner in the process of withdrawal, whose capital was still in the hands of the Partnership and at the risk of the business. As the Trial Court found, all of the appellants -- each for his own reasons -- conspired to carry out the various steps designed to deprive Gross of his valuable capital interest in the Partnership. We suggest that it can never be argued that a victim of a breach of fiduciary duties has no standing to complain thereof.

D. Persky's false opinion letter was an important act in carrying out the conspiracy. It was also separately tortious.

Judge Owen found that Persky issued a knowingly false opinion letter on the night of the closing. By pretending that the Rosenman firm's firm refusal to issue the required opinion letter was some last moment aberration, Persky put himself in the position of being able to say to the other lawyers that he had done the research and was able, himself, to issue the opinion. In this deception, Persky was aided and abetted by at least one other lawyer from the Finley Kumble firm, Mr. Bamberger, who had been working closely with Persky and Burak in the negotiations and drafting of the Transfer Agreement. Bam-

berger said over and over again that he could find no cases in point (A2235-36, A2243); yet, he had been given a case squarely in point by Burak, which case is cited in the Rosenman memorandum: Executive Hotel Associates v. Elm Hotel Corp., 41 Misc. 2d 354, 245 N.Y.S. 2d 929 (Civ. Ct. 1964), aff'd 43 Misc. 2d 153, 250 N.Y.S. 2d 351 (App. Term 1st Dep't 1964). This case, as the Rosenman memorandum shows "... turned directly on the failure to meet the statutory requirements of §98" (E805).

The Executive Hotel Associates case is annotated in the first place one would look when researching a question on the meaning of §98 of the Partnership Law -- in the pocket part of the Partnership Law, under §98, in McKinney's Consolidated Laws of New York. Unaccountably, despite the pretended research of Persky and Bamberger, the Executive Hotel Associates case is not mentioned in Persky's opinion letter (E950a).

Nor did Persky's opinion mention another case reported in the annotations to §98 in McKinney's: Mist Property, Inc. v. Fitzsimmons Realty Co., 228 N.Y. S. 2d 406 (Sup. Ct. 1962). The Mist case was also discussed in the Rosenman memorandum, wherein it was noted that the decision in Mist turned upon the fact that the sale in the case was one "specifically contemplated and provided for in the Partnership Agreement" (E805).

The attorneys for Finley Kumble argue that a lawyer may not be held liable as a conspirator because he makes an honest mistake of law in rendering an opinion about a matter as to which there can be reasonable disagreement. The fallacy in that position is that Judge Owen found, on ample evidence, that Persky's opinion was knowingly false.

As a second line of defense, the Finley Kumble brief argues that the false opinion is legally irrelevant as the opinion could have been waived by Persky's client, the corporation, and the deal would have been closed anyway. Again, Finley Kumble's argument ignores a contrary finding by Judge Owen. Finley Kumble's witness, Mr. Steefel, testified that the attorneys for the Limited Partners made it very clear that there would be no closing unless there was an opinion letter as to the proper authorization of the agreement on behalf of the Partnership (A725). Even Muh, a member of the New Team and Persky's client, testified that on the night of the closing Berkowitz told him "...that we have to have an opinion letter". (A3352). Thus, there is absolutely no basis for the attack on Judge Owen's finding that the opinion letter was "essential" to the closing.

Finally, as a third and last line of defense with regard to this false opinion letter, Finley Kumble's attorneys argue that Gross, Bleich and DOnoghue were not deceived by the Finley Kumble opinion letter, did not rely on it, and therefore were not harmed by it. They cite cases on fraud and deceit and make technical arguments about reliance and causation.

This argument is entirely out of point. The opinion letter was not intended to deceive Gross, Bleich and Donoghue, but to deceive Steefel and the other attorneys for the Limited Partners and Subordinated Lenders. It was successful in the intended deception. Steefel testified that, at the time of the closing, he believed Persky to be a reputable attorney* and he relied on Persky's opinion and therefore closed the agreement (A747).

In citing cases on fraud and deceit Finley Kumble's attorneys are addressing themselves to the wrong tort, once again demolishing a straw man. The tort here in question, which is not quite the same as defamation, is sometimes referred to as "injurious falsehood". The label is not important. The law recognizes tort liability on the part of one who knowingly furnishes false information about another to a third party, knowing or intending harm to the business or legal interests of the other. Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co.,

*Persky was not indicted until several years later.

7 App. Div. 2d 441, 184 N.Y.S. 2d 58 (1st Dep't 1959); Felis v. Greenberg, 51 Misc. 2d 441, 273 N.Y.S. 2d 288 (Sup. Ct. 1966); Al Raschid v. News Syndicate Co., 265 N.Y. 1, 191 N.E. 713, (1934); Restatement of Torts, §873.

In Penn-Ohio Steel Corp., supra, the Court held defendant could be found liable for furnishing false and misleading information to the Internal Revenue Service concerning the plaintiff, saying:

> "By its very nature a false statement intentionally made is wrongful. If it inflicts material harm upon another, which was or should have been in the contemplation of the actor, and it results in actual damage to the plaintiff's economic or legal relationships, an action may lie. (Prosser op. cit. p. 760, et seq.). It logically follows that to sustain a complaint, it is not necessary that the pleading must allege that the defendant was solely motivated to injure the plaintiff. It is enough if the falsehoods charged were intentionally uttered and did in fact cause the plaintiff to suffer actual damage in his economic or legal relationships." (184 N.Y.S. 2d at 61)

Having met the challenge to show that this false opinion letter constituted a separate tort, we must nevertheless reiterate that it was in no way necessary for us to do so. As we have shown, an act need not be separately tortious in order to constitute complicity in conspiracy. The significance of Persky's opinion letter is that it was a vital step in the conspiracy.

The general partners pretended to believe in the validity of this opinion, though they had received contrary

advice from their own attorney, Burak. The New Team authorized Persky to give this opinion in a conflict of interest situation, also knowing it was false.

POINT II

ANSWERING APPELLANTS' VARIOUS BRIEFS

A. Kayne's Brief

This brief is suffused with statements of fact which are not in accord with the findings of the Court. Record references are made to testimony given by Kayne and other appellants as though these statements are binding upon this appeal, even though these statements have been contradicted by other testimony, or are inconsistent with the findings.* We need hardly argue that such "facts" constitute an erroneous groundwork for the analysis of applicable law. Limitations of space confine us to pointing out only a few of the most important errors of this sort.

1. Donoghue's Status as a Party

Kayne's brief repeatedly makes the erroneous statement that Mrs. Donoghue has no standing in this litigation, as she was never given leave to intervene. Based on this erroneous idea, Kayne's brief ends with a resounding argument deploring the disregard of procedural and jurisdictional precepts in this case. Apparently Mr. Kayne's attorneys have overlooked the fact

*Kayne's approach, of course, reverses the fundamental principal of Rule 52, under which findings of a trial court are to be construed liberally in support of the judgment. "Whenever, from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn...". Triangle Conduct & Cable Co. v. FTC, 168 F.2d 175, (7th Cir. 1948), aff'd sub. nom Clayton Mark & Co. v. F.T.C., 336 U.S. 956, (citations omitted).

that Judge Owen issued a formal order granting leave to intervene which is published in 62 F.R.D. 397 (S.D.N.Y. 1974). Apparently they also overlooked that in ¶93 of the reply and answer (P72) appellants raised a counterclaim as to Jeanne Donoghue, adopting by reference all of the allegations of the complaint pertaining to Mabel Bleich.

Finley Kumble's brief, it seems, also overlooks Judge Owen's order permitting intervention and ¶93 of the answer and reply (Finley Kumble brief, p. 22).

We intend no criticism of the attorneys. We understand full well how such an oversight can occur in connection with a record of this magnitude. However, we hope that this correction will serve to clear the air, and remove a distracting non-issue from the ambit of this appeal.

2. Gross' Alleged Plot to Force Liquidation. Kayne's brief throughout argues that Gross was trying to force Newburger, Loeb & Co. to pay out in February, 1971 capital which he was not entitled to receive until September 1st (12 months after his resignation in September, 1970), and that Gross was trying to force a liquidation so that he could get his money six months early. Kayne's brief also gives the impression that the only thing that the proponents of the deal wanted from Gross was that he wait patiently until his money came due in September.

Kayne's attorneys have fallen into an astonishing double misunderstanding of the facts. First, Gross was not demanding a liquidation so that he could get his money out a few months earlier. When threatened with the dire results of a liquidation,

he responded, truthfully, that he preferred a liquidation to the proposed Transfer Agreement (A2344). Second, it is entirely erroneous to suggest that Persky, Kayne, et al., just wanted Gross to wait until September to get back his capital. There is not one word in the record which supports any such suggestion. What they wanted from Gross was that he go along with the Transfer Agreement, which meant that he would give up his right to cash, and accept instead preferred stock or long term notes of the new corporation. In other words, Gross was resisting an effort to cram "paper" of the new corporation down his throat.

There was no shadow of any legal claim that he was required to exchange his rights under the Partnership Agreement for a long term investment in a corporation managed, and principally owned, by Kayne, Risher, Muh, Sloane and Berkowitz, with their trifling investments of $10,000 each. Yet Gross was constantly portrayed in the negotiations, as he is now portrayed in Kayne's brief, as a spoiler or a hold-out because he would not, as they put it, accept the same deal as other partners with "good capital". Persky testified (A1236) that they wanted Gross "...to accept the same type of securities that the other General Partners who were simply (sic) situated were going to get in the transaction". Leo Stern testified in deposition (A1539-1542) that he felt that Gross' capital should not be repaid to him, because Gross refused to take this same kind of treatment as other partners with good capital.

As it happened, Gross' assessment of the situation was entirely correct. Kayne, Muh, et al. made a killing, but none of the Limited Partners, or General Partners in Gross' position, ever got a penny of their capital back (A1261, 62). Judge Owen found that Gross and the Limited Partners would have been paid in full as a result of a liquidation. To portray Gross as a schemer trying to destroy the Partnership in order to get advantages not provided by the Partnership Agreement seems to us to be beyond the bounds of plausible interpretation of the record and the findings (P518, 519).

3. Gross' Alleged Wrongs Against Kayne and the Partnership. Kayne's brief argues as fact all of the accusations against Gross which were made by Kayne in his litigation and arbitration, and also the accusations against Gross which were asserted in the reply. The assertion of these "facts" hardly seems appropriate in view of Gross' success in the California litigation, his vindication in the New York Stock Exchange arbitration, and Judge Owen's findings that Kayne's claims, as well as all of the claims asserted in this litigation against Gross, were "baseless and fraudulent". The secondary argument that Kayne believed in the merit of all of these claims, is belied by Judge Owen's finding that they were all brought in bad faith.

4. Kayne's Argument that he could not have been a Conspirator because he was away in California or out of the Country. There was a very brief period during early December, 1970, when Risher, in a spasm of greed, tried to oust Kayne

from the takeover plan which Kayne had originated and pursued since that August. (A2875) Risher's plan failed for a number of reasons, and by December 17, 1970 Kayne was back in the deal, to be Chairman of the Board and own an equal stock ownership with Risher and Muh (E223, 224, 225). To argue that Kayne could not have been a conspirator after December 17 because he was in California, is to engage in the wishful thought that the Court is unaware of the mails, the telephone and the airplane. On December 30, 1970, when Kayne got the idea that the New Team should seize the "in kind" securities, he wrote Risher a letter directing him to do so (E47). That day the mails were working. On January 15, 1971, when Persky, Risher and Muh failed in their effort to get Gross to accede to their plans for his capital, they at once telephoned Kayne in California, and minutes later Sloane was on the phone threatening Gross (P526). The telephone was working that day. On January 23, Kayne came to New York and threatened Gross personally at a luncheon meeting (P526). The airplane was working that day. Kayne attended the closing on February 11, and signed the agreement, in various capacities, in full awareness of all of the facts; further, he was Chairman of the Board of Directors of the corporation which brought the Buckley action against Gross.

There can be no semblance of validity to any argument attacking Judge Owen's finding that Kayne was an active and knowing participant in the conspiracy.

B. The Brief of Plaintiff, Newburger, Loeb & Co., Inc.

We believe that the brief submitted on behalf of Newburger, Loeb & Co., Inc. seriously confuses three different types of claims, two of which are not present in this case on appeal and were not before the Trial Court. The complaint raises no claim other than churning. The complaint does not raise any claim that Mr. Jordon "fraudulently dissuaded Buckley from selling stock" (See Newburger, Loeb & Co., Inc. brief page 23), or that Jordon refused to follow an instruction of Buckley to sell stock at any time. The complaint does not raise any issue concerning the spreading of false rumors regarding a copper strike, or of bad advice not to sell.

The injection of such extraneous accusations, none of which had any credibility, only creates confusion. The confusion is heightened by arguments based on the assertion that Buckley was "unemployed" at the time of trial, which was 9 years after the last trade in the account.

These prejudicial irrelevancies should not be allowed to distract from the recognition that the Buckley claim was totally devoid of proof with regard to a vital element of the complaint, namely control of the account by the broker.

A sine qua non of liability for churning is the

broker's control over the account. Primarily, such control exists when the account is discretionary -- that is, when the broker is given the right to make purchases and sales in his own discretion, without the prior consent and approval of the customer. In non-discretionary accounts, churning can be imputed only when the naivete of the customer, or a special relationship between the customer and the broker, indicates that the broker controls the account even without formal discretionary authority:

> "Control by the dealer over the transaction in an account is essential to a finding that the account has been churned, and the relationship between customer and dealer is an important indicator of the degree of such control. Although the SEC once limited its findings that churning existed to cases in which the account was a formally discretionary one, this is no longer the case. A degree of control sufficient to warrant protection has in some cases been inferred from a showing that the customer was in fact likely to have relied on the dealer's suggestions. In determining whether the evidence presented establishes the requisite control, the likelihood that customers will depend on their dealer's advice must, however, be weighed against the importance of protecting dealers from customers who determine their own fate through unsound trading judgments and attempt to hold the dealer as a guarantor. (Churning by Securities Dealers, 80 Harvard Law Review 869 [1967], at p.871.)

The importance of protecting dealers from the afterthoughts of speculators is self-manifest. There are many capable and sophisticated individuals who choose to trade

and to speculate and who never offer to share their gains with their brokers. The law does not make brokers liable for the losses of such persons, no matter what the volume of their transactions.

Apparently the brief of Newburger, Loeb & Co., Inc. recognizes that absent control on the part of the broker there can be no claim for churning. Where no discretion has been granted to the broker or exercised by him, and yet a claim of churning is made, the question of control becomes a question of fact to be determined by the trier of fact, based upon all of the evidence relating to the nature of the customer, his objectives, and his relationship with the broker.

In the instant case, after hearing the evidence very carefully and fully, Judge Owen found that Buckley was "thoroughly knowledgeable" and turned down the vast majority of the transactions proposed by Jordon. Judge Owen found that the volume of transactions was motivated by Buckley's desire to speculate. Judge Owen went further: he concluded from all of the circumstances that the claim was baseless, and known to be so by Persky and the other conspirators who used it as a ploy against Gross, Bleich and Donoghue.

We do not see any basis for an allegation of error

regarding Judge Owen's factual determination. To argue that the volume of transactions proves control is circular in reasoning. To allege that the giving of "bad advice" proves control is to base a non-sequitur upon a non-fact. To argue that the broker refused to follow an order to sell would seem to contradict a claim of churning, yet, again, the factual allegation is unfounded in the Record, let alone the findings.

The Newburger, Loeb & Co., Inc. brief inaccurately states on page 22 that Miles indicated upon cross-examination that in view of the rate of turn-over of capital the possibility existed that the Buckley account had in fact been churned. An examination of the Record reference (A1528) indicates that Mr. Miles was given a hypothetical question in which the broker had control of the account and in which the customer did not wish to speculate, and asked whether those elements could describe a churning situation. Both of these elements are directly contrary to the well supported findings in this case.

Absent substantial evidence of control, there can be no substance to a claim of churning. We believe that the Newburger, Loeb & Co., Inc. brief has failed to show the slightest evidence that Jordon controlled Buckley's account.

C. The Brief of the Partnership and Certain General Partners: Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern and Robert L. Stern, as executors of the Estate of Leo Stern, deceased, and Sanford Roggenburg.

Point V of the partners' brief is based on arguments which cannot stand up in the face of the record and the findings.

(1) The partners argue that the Transfer Agreement was a salvage operation, not a grab. It operated to salvage the General Partners from paying $500,000 that they owed. It operated to give Kayne and Muh a $400,000 return, after one year, on a $10,000 investment, and proportionate gains to Sloane and Berkowitz. It "salvaged" the Limited Partners and General Partners with"good capital" to the extent that they got nothing at all for the corporate paper they took.

The partners argue that their acts were necessary to avoid a liquidation, but Judge Owen found that Gross, Bleich and Donoghue would have been paid in full if the corporation had been liquidated. Furthermore, as Judge Ward pointed out (P454, 455), a motive to avoid liquidation does not justify the performance of the wrongful acts in which these partners joined.

(2) The partners' brief denies that they had nothing to do with the institution of the lawsuit against Gross and Bleich. This argument is based upon a profound misunderstanding of the record. The Partnership authorized the settlement with Buckley, in which Persky secured from Buckley an assignment of his churning claim to the Partnership. The partners then assigned this churning claim to the corporation knowing full well that

the New Team intended to use the claim to hold off the payments of capital. The very agreement itself lists the capital claims of Gross, Bleich and Donoghue as potential litigations. Partners and the partnership attorney were present at the meetings of February 5 and February 8, when Gross was told over and over again that the Buckley claim would be pressed against him if he did not go along with tne Transfer Agreement. Partners and their attorney were present on February 5 when Persky passed around the purported complaint in the partnership name falsely naming Gross as the one who personally churned the Buckley account. No partner disavowed this "complaint", and no partner protested that Jordon, not Gross, had handled the Buckley account.

(3) The partners' brief states that the partners believed Persky's opinion was correct that the Transfer Agreement was authorized, and that they did not believe in the correctness of the opinion of the Rosenman firm, their own attorneys. But no partner appeared in court to testify that he believed Persky's opinion and disbelieved Burak's. The partners were conspicuously absent. Furthermore, an examination of the Transfer Agreement shows that the partners insisted on getting indemnifications from the corporation for any and all liability which they might have because of invalidity of the Transfer Agreement. We suggest that it is -- at the very least -- extremely unusual for the buyer to indemnify the seller for any defect in the seller's right to make the sale.

It seems clear to us that there is ample evidence to support Judge Owen's finding that the partners recognized the

Transfer Agreement was invalid, but went through with it as a calculated risk because they wished to get foregiveness of indebtedness and to get releases of liability from the Limited Partners.

(4) The partners' brief does not mention their breach of fiduciary duty in demanding and taking forgiveness of debt in exchange for their acts in approving the Transfer Agreement.

(5) Nor does the partners' brief mention their participation in the acts, taken in their name, to destroy Gross' employment with Rafkind & Co.

POINT III

JURISDICTION PROPERLY EXISTS WITH REGARD TO EVERY COUNTERCLAIM UPON WHICH AWARD WAS MADE IN THE JUDGMENT

A. Ancillary Jurisdiction Exists Over The Counterclaims Because They Are Logically Related To The Complaint

Appellants' jurisdictional arguments are based upon an artificial and inaccurate view of the issues of the case. They make the simplistic argument that there can be no logical connection between plaintiff's claim that Buckley was churned in the period 1962-66, and defendants' various claims that they were victimized by a conspiracy in breach of fiduciary duties in 1970 and 1971.

This presentation overlooks the fact that it was not Buckley who brought the instant action but a new corporation which was activiated in 1971. An essential part of the complaint

was the allegation that the plaintiff owned the cause of action it was suing on. Plaintiff's title to the churning claim is based upon the Transfer Agreement under which it acquired all of the Newburger, Loeb partnership -- an agreement which the defendants claim was unauthorized, and was induced by fraudulent special considerations.

Further, the corporation's title to the churning claim did not go to it directly from Buckley, but from the Newburger, Loeb partnership, which acquired it in a settlement negotiated with Buckley in December of 1970. Defendants assert in their counterclaims, and also by way of defense, that the settlement with Buckley was manipulated in bad faith as part of the conspiracy alleged in the counterclaims.

In the present posture of the case, the contentions made in the counterclaims are not merely allegations of pleadings: the Trial Court found that the settlement was made in bad faith and also found that the Transfer Agreement, passing title of the claim to plaintiff, was unauthorized and fraudulently induced.

Appellants even overlook the fact that the complaint itself alleges -- as an essential element of the claim -- the assignment by Buckley to the Partnership (Complaint, ¶4, E3) and the assignment by the Partnership to the corporation under the Transfer Agreement (Complaint ¶5). Every link in the chain of title is vital to the complaint. No matter how grievously Buckley might have been churned, Newburger, Loeb & Co., Inc. could not bring action unless it effectively owned the claim.

There was no way in which Gross, Bleich and Donoghue could have drafted an answer to the complaint without admitting or denying the validity of the two successive assignments alleged in Paragraphs 4 and 5. They believed that the Transfer Agreement of February 11, 1971, which included the assignment alleged in Paragraph 5 of the complaint, was wrongful, invalid and brought about by fraudulent self-dealing. They also believed the settlement with Buckley was wrongfully made to acquire the claim to be used as a tool against them. They had no choice but to raise these issues in the answer. The compulsory counterclaim rule consequently forced them to bring into this action all of their counterclaims based on these same facts and contentions.

Each and every counterclaim upon which judgment was granted (First, Second and Fourth) is based upon the allegation that the Transfer Agreement is invalid and fraudulent. Both Judge Ward and Judge Owen recognized that ancillary jurisdiction exists as to these claims.*

We believe that any whole view taken of this case and controversy indicates at once that the Transfer Agreement is the very heart of the matter, factually and legally. Persky's own admissions prove that he arranged an assignment of the Buckley claim so that he could use it to push through consent to the

*The Ninth Counterclaim is based on the Sherman and Clayton Acts and, hence, has independent Federal jurisdiction. The facts of the Ninth Counterclaim overlap the conspiracy counterclaims, because the enforcement of an overbroad, non-competitive covenant, amounting to an unreasonable restraint of trade, was carried out in order to club Gross into going along with the Transfer Agreement.

Transfer Agreement. The corporation got the Buckley claim under the Transfer Agreement, and then used it to hold off the obligations to Gross, Bleich and Donoghue which it had assumed under the Transfer Agreement (E39). The Transfer Agreement itself provided that the corporation would indemnify the General Partners against the very claims of illegality and invalidity asserted in the counterclaims (E547, E552, E558).

The Trial Court's findings in every way confirm the allegations of the counterclaims which link the settlement and assignment of the Buckley claim with the events surrounding the Transfer Agreement. (P519, 520). Indeed, the entire opinion reflects the fact that the Buckley claim was a ploy in the struggle over the Transfer Agreement, and that the issues raised in the counterclaims are inextricably interwoven with the chain of assignments which link Buckley's claim with the corporate plaintiff.

The precedents amply support recognition that such linkage creates ancillary jurisdiction over the counterclaims. The leading case is Moore v. New York Cotton Exchange, 270 U.S. 593 (1926), in which the Supreme Court held that the counterclaim arises out of the same transaction or occurrence as the complaint if there is a logical relationship between them, or they have a common link, or if some essential facts alleged by the plaintiff constitute part of the counterclaim.

In Moore, the plaintiff sued on an anti-trust claim alleging that the defendant wrongfully refused to supply him with its quotation service. The defendant counterclaimed,

alleging that the plaintiff was stealing the quotations, and asked for an injunction. It is obvious that under the analysis offered by our adversaries, the refusal to sell would be a matter entirely unrelated to the subsequent theft of quotations. Yet the Supreme Court did not follow this restrictive and artificial line of reasoning.

The following quotation from Moore appears over and over again in the subsequent cases:

> "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituring the subject-matter of the counterclaim. It is one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counter-claim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule [the compulsory counterclaim provision of Equity Rule 30] of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim." (270 U.S. at 610.)

In the instant case the assignment of the Buckley claim under the Transfer Agreement is an essential allegation of the complaint, without which no valid cause of action could exist. This allegation is linked to a central feature of the counterclaims, namely that the Transfer Agreement and assignment were unlawful and ineffective. To further parallel the reasoning

of the Moore decision, essential facts alleged by the plaintiff in the complaint "...enter into and constitute in part the cause of action set forth in the counterclaim." The legal and factual issues relating to validity of the Transfer Agreement -- which would have to be tried even if the complaint were tried alone -- also would have to be tried in precisely the same detail if the counterclaims were tried alone.

We suggest that it is impossible to analyze the pleadings in this case or to study the District Court's opinion without recognizing that the complaint and the counterclaims are logically related, indeed, that they are inextricably interwoven. We further believe it evident that the interests of justice, as well as judicial economy, required that these linked and interwoven claims be tried together to avoid duplication of issues.

The compulsory counterclaim has been given a liberal construction. 3 Moore's Federal Practice, §13.13.

In Great Lakes Rubber Corporation v. Herbert Cooper Co., Inc., 286 F. 2d 631, 634 (3d Cir. 1961), the Court said:

> "We have indicated that a counterclaim is compulsory if it bears a logical relationship' to any opposing party's claim. Zion v. Sentry Safety Control Corp., 3 Cir., 1958, 258 F. 2d 31. See also United Artists Corp. v. Masterpiece Productions, Inc., 2 Cir. 1955, 221 F. 2d 213, 216. The phrase 'logical relationship' is given meaning by the purpose of the rule which it was designed to implement. Thus, a counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal

> issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action."

Appellants' reliance upon Pipeliners Local #798 v. Ellerd, 503 F. 2d 1193 (10th Cir. 1974) seems misplaced. In that decision the court upheld jurisdiction over the counterclaim stating that the "logical relation" test is the most controlling, and that in deciding such questions of ancillary jurisdiction the terms "transaction" or "occurrence" must be accorded liberal construction.

We believe that the judicial trend has been to broaden and liberalize the criteria for determining compulsory counterclaims in the interest of avoiding multiplicity of litigation. This is illustrated by the decision of this Court in U.S. v. Heyward-Robinson Company, 430 F. 2d 1077 (2d Cir. 1970), cert. den., 400 U.S. 1021, in which the majority of the Court recognized as a compulsory counterclaim, defendant's claim against plaintiff based on an independent contract.

There is no relevance in the cases cited by our adversaries relating to the unavailability as compulsory counterclaims of the claim of malicious prosecution. As we have explained in our Point I, the counterclaims in this case do not constitute a claim of malicious prosecution in any way; malicious prosecution is a straw man erected by the adversaries. Further, if any part of the counterclaim is "premature", it would seem that this would go to the merits, and not to the jurisdiction over the claim. Surely, malicious prosecution claims brought prior to the determination of the main action

are dismissed routinely on the substantive merits in state courts where there exists no question of subject matter jurisdiction.

Nothing but confusion is contributed by arguments to the effect that jurisdiction over the counterclaims is lacking because the counterclaims are substantively defective. For the purposes of determining jurisdiction, the pleader's theory of his case is accepted at face value. Arguments going to the substantive merits of the case, under questions of law or fact, do not impinge upon jurisdictional considerations. Solomon v. Bruckhausen, 305 F. 2d 941 (2d Cir. 1962), is not in point. That case arose under the admiralty rules which placed strict limitations, which the Court recognized may be anachronistic, upon bringing of cross-libels. Bach v. Quigan, 5 F.R.D. 34 (E.D.N.Y. 1945) was not decided on a jurisdictional basis, but on a substantive basis. The counterclaim was struck because it failed to state a "claim upon which relief can be granted."

In Dairy Foods, Inc. v. Dairy Maid Products Cooperative, 295 F.2d 805 (7th Cir. 1961) a counterclaim alleged that the complaint was filed as part of an anti-trust conspiracy. The district court dismissed the counterclaim as premature. The Court of Appeals reversed, saying:

> "We are not persuaded by plaintiff's contention that the counterclaim is premature and therefore fails to state a claim upon which relief can be granted. The injury of defendant's business or property occurred when plaintiff filed

> the infringement suit --the compulsion which forced the choice. Defendant's right of action, asserted by its counterclaim, then accrued. Emich Motors Corporation v. General Motors Corporation, 7 Cir. 229 F. 2d 71.4 The fact that the damages sought include costs and expenses yet to accrue at the time the counterclaim was filed, as well as expenditures already made to defend the patent infringement suit, does not make the counterclaim premature. Lawlor v. Loewe, 235 U.S. 522, 526, 35 S. Ct. 170, 59 L.Ed. 341" (297 F.2d 809).

In Rockler & Co., Inc. v. Minneapolis Shareholders Co., 69 F.R.D. 1(D.C. Minn. 1975) the court upheld jurisdiction over a counterclaim which alleged that the complaint was fraudulently brought. The plaintiff sought dismissal on the grounds that the counterclaim was for "malicious prosecution or abuse of process." The court rejected this argument, stating that the complaint must be read in a light most favorable to the pleader, and not in the manner defined by the plaintiffs. The court also recognized that the counterclaim which alleged that the complaint was wrongful, had a logical relationship to plaintiff's claims and, therefore, was a compulsory counterclaim.

In Interphoto Corporation v. Minolta Corporation, 47 F.R.D. 341 (S.D.N.Y. 1969), the court said:

> "A counterclaim is not barred because recovery will depend on the outcome of the main action, e.g., Aetna Life Insurance Co. v. Little Rock Basket Co., 14 F.R.D. 381 (E.D. Ark. 1953) (insurer's declaratory judgment action to declare it not liable on life insurance policy; beneficiary's counterclaim for the amount of the policy.)" (47 F.R.D. at 344)

United Artists Corp. v. Masterpiece Productions, 221

F. 2d 213 (2d Cir. 1955), is precisely in point. Plaintiff brought a copyright infringement action. Defendants counterclaimed against plaintiffs and additional defendants on counterclaims alleging that plaintiffs and additional defendants had conspired to deprive defendants of their rights under a copyright license, and that the lawsuit itself was one of a series of maneuvers taken as part of the conspiracy. This Court held that the counterclaim was logically related to the complaint and that ancillary jurisdiction existed with regard to the counterclaim against all of the additional defendants on counterclaims as well as plaintiff.

B. Pendent as well as Ancillary Jurisdiction Exists Over the Counterclaims, Because They are all Related to the Ninth Counterclaim, which is Based on the Sherman and Clayton Acts.

The ninth counterclaim is based on the Sherman and Clayton Acts (15 U.S.C., §§1-7 and 12-27 respectively). It alleges that the conspirators destroyed Gross' employment with Rafkind & Company. This destruction was accomplished through the use of an anti-competition covenant, contained in the partnership agreement, which was overly broad in its terms, and overly broad in its application in the instant case: it was therefore an unreasonable restraint within the meaning of the anti-trust laws, supra. This issue is the subject of our cross-appeal, wherein we show that the Trial

Court's findings of fact compel a conclusion that the antitrust laws were violated by the conspirators. Precisely the same acts are alleged as violations of State antitrust law under the Eighth Counterclaim and are also pleaded as one step in the overall conspiracy alleged in the Fourth Counterclaim.

The antitrust counterclaim directly asserts a separate basis for jurisdiction over the plaintiff and each of the additional defendants on counterclaims, all of whom were conspirators in the antitrust violation. As appellants have complained of the "outreach" of jurisdiction with regard to the additional defendants, we think it worth noting that an independent federal cause of action exists against each and every appellant. Thus, each additional defendant on counterclaims is properly in this case without any help whatsoever from claims based on doctrines of ancillary or pendent jurisdiction.

While we are confident that the Court will agree with our contention that the antitrust laws were violated, it is not necessary for us to prevail upon that issue in order to sustain jurisdiction over the other counterclaims. The existence of ancillary or pendent jurisdiction does not await a determination on the merits after trial. If the federal claim is not patently without substance, or brought in bad faith, it provides a basis for pendent jurisdiction.

The relationship between the federal counterclaim and all the other counterclaims is clearly sufficient to support

pendent jurisdiction under the liberal tests of United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In that case the Court ruled that where there is a substantial federal question in any one claim, the Court may take jurisdiction over all other claims that would ordinarily be expected to be tried together with it in one judicial proceeding, saying:

> "The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole." (383 U.S. at 725)

In the instant case, the federal antitrust counterclaim derives from a "common nucleus of operative fact" with the other counterclaims. All arise from the Transfer Agreement and the conspiracy to deprive Gross and the other dissenters of their rights and property in connection with the partnership. As the Trial Court found, the conspirators destroyed Gross' Rafkind employment as part of the plan to club him into going along with their proposed sale of the partnership assets. The illegality of that sale, and the conspiracy to push it through despite its illegality, are the subject of the other counterclaims. To use the test

set forth in United Mine Workers v. Gibbs, it seems to us that the various counterclaims are such that one would "ordinarily be expected to try them all in one judicial proceeding." The goals of judicial economy and effectiveness, which underlie the doctrines of ancillary and pendent jurisdiction, clearly required that all of the claims in the instant case be heard in one proceeding.

One further comment is in order. The Court should not lose sight of the fact that Gross, Bleich and Donoghue did not pick or maneuver to have their claims heard in the Federal Court. That forum was chosen by the adversaries. The Federal Court was the only forum in which Gross, Bleich and Donoghue could get a single trial of all claims, and it was a forum to which they were mandated by the compulsory counterclaim rule. The "outreach" that appellants complain of merely consists of proper use of the Rules of Federal Procedure, and of the doctrines of ancillary and pendent jurisdiction for the purpose for which they are intended, namely to try together, in one place at one time, all related claims.

C. The Court Properly Awarded Damages with Regard to the Conversion of Gross' "in kind" Securities. There is no Merit to the Claim that the Court had no Jurisdiction over this Aspect of the Conspiracy.

The theft of Gross' warrants to buy stock of Geon Industries and Computer Softwear Systems Inc. was pleaded as

a separate counterclaim (Third Counterclaim, P44). It was alleged that: "In connection with the Transfer Agreement the partnership purported to transfer to the corporation said property of Gross . . .". Apparently we did not succeed in making it clear to Judge Ward in the motion for summary judgment that the conversion of these warrants, purportedly transferred to the corporation under the Transfer Agreement, was "logically connected" through the Transfer Agreement to all the other issues of the case, including the churning claim alleged in the complaint, which claim also came into plaintiff's hands through the Transfer Agreement.

Judge Ward ruled in the summary judgment motion that the Third Counterclaim was not logically connected to the complaint, which we think was erroneous, and he denied ancillary jurisdiction. Apparently Judge Ward also failed to consider whether pendent jurisdiction would exist over the Third Counterclaim by reason of its common nexus with the other counterclaims. Despite Judge Ward's ruling denying ancillary or pendent jurisdiction, the counterclaim remained in the case to be tried as a potential setoff, and all of the issues pertaining to it were tried in full. Early on, we informed the Court and opposing counsel that we intended to move to conform the pleadings to the proof.

During the 1975 trial, with all the evidence before him, and with a full understanding of the factual pattern relating all the claims one to another, Judge Owen perceived that the conversion of the warrants was a portion of the whole. This perception led him to the proper conclusion that relief should be granted for a serious wrong which was clearly proven. Accordingly, in his decision (P536) he recognized that the allegation of conversion of Gross' capital pursuant to the conspiracy could be argued to include Gross' warrants held in firm name, and additionally, he amended the pleadings to conform with the proof. Thus he granted relief for a fully litigated matter. In doing so he was clearly right.

There is no merit to the contention that Judge Owen was bound by Judge Ward's prior determination denying jurisdiction as to the third counterclaim. It is well settled that "law of the case" is not a doctrine rigidly binding upon the Court, but is only addressed to its good sense: Dictograph Products Company v. Sonotone Corporation, 230 F.2d 131 (2d Cir. 1956), appeal dismissed, 352 U.S. 883; Higgins v. California Prune & Apricot Grower Inc., 3 F.2d 896, 898 (2d Cir. 1924); Zdanok v. Glidden Company, 327 F.2d 944 (2nd Cir. 1964), cert. denied, 377 U.S. 934; Ross Products, Inc. v. New York Merchandize Co., 242 F.Supp. 878 (S.D.N.Y. 1965).

The impetus towards reconsideration of the prior decision is greater when at stake lies a fundamental issue, especially jurisdiction: Pacific-Atlantic Steamship Company v. United States, 127 F.Supp. 931 (D.C. Del. 1955); Century Transit Co. v. United States, 124 F.Supp. 148 (D.C.N.J. 1954), reversed on other grounds sub. nom Fiorentino v. U.S., 226 F.2d 619 (3d Cir. 1955). Professor Moore states ". . . when the issue is jurisdictional or of a substantial nature, the Court may with greater propriety consider a prior ruling". 1B Moore's Federal Practice, ¶ 0.404, page 452.

See also F.R.C.P. 54(b) and Coffman v. Federal Laboratories, 171 F.2d 94 (3rd Cir. 1948), cert. denied, 336 U.S. 913.

Thus, Judge Owen had the power -- indeed the duty -- to reconsider Judge Ward's ruling denying ancillary jurisdiction of the Third Counterclaim if necessary. But it was not necessary for him to do so. The ends of justice were met by the application of Rule 15(b) conforming the pleadings to the evidence to embrace the conversion of the warrants within the fourth counterclaim. This was a proper procedure mandated by the Rule, and if the Trial Judge had not done so, this Court could do so itself: Purofied Down Products Corp. v. Travellers Fire Ins. Co., 278 F.2d 439 (2d Cir. 1960).

POINT IV

THE AWARD OF DAMAGES WAS PROPER

A. The Trial Judge had Power to Award Punitive Damages

The Trial Court had the power to award punitive damages in the instant case because the actions of the conspirators were wanton, reckless, malicious and offensive to public conscience and welfare, and involved an aggravated form of libel and numerous other torts.

As we have shown, the conspiracy in the instant case involved (1) wrongdoings which were criminal in nature, (2) use of a fraudulent attorney's opinion, and (3) misuse of litigation. One of the principal wrongdoers was an attorney who abused his position as a practitioner and officer of the Court. All these transgressions were gross, wanton, and involved a high degree of moral culpability.

The leading cases under New York law defining a litigant's right to punitive damages are: Walker v. Sheldon, 10 N. Y. 2d 401, 179 N.E. 2d 497, 223 N.Y.S. 2d 488 (1961); Toomey v. Farley, 2 N.Y. 2d 71, 156 N.Y.S. 2d 840, 138 N.E. 2d 441 (1956); Kujek v. Goldman, 150 N.Y. 176, 44 N.E. 773 (1896).

Our adversaries are correct in stating that under Walker v. Sheldon, supra, and its progeny, punitive damages are not available in the ordinary case of fraud and deceit, but as we have shown, this is neither an ordinary case of fraud and deceit, nor a simple case of conversion. The nature of the conspiracy in

this case, we submit, reaches the level of outrage which justifies and requires punitive damages.

Further, our adversaries have overlooked the fact that one of the torts committed in this conspiracy consisted of defaming Gross, and there cannot be the slightest doubt that the law of New York fully recognizes punitive damages as applicable with regard to defamation: Buckley v. Littel, 394 F. Supp. 918, 944 (S.D.N.Y. 1975) modifed and aff'd 539 F. 2d 882 (2d Cir. 1976); Goldwater v. Ginsberg, 414 F. 2d 324 (2d Cir. 1969) cert. denied, 396 U.S. 1049, Reh. den. 397 U.S. 978; Faulk v. Aware, 19 App. Div. 2d 464, 244 N.Y.S. 2d 259 (1st Dep't 1963), aff'd 14 N.Y. 2d 899, 252 N.Y.S. 2d 95, 200 N.E. 2d 778, cert. denied 380 U.S. 916 (1965), Reh. den. 380 U.S. 989; Toomey v. Farley, 2 N.Y. 2d 71, 156 N.Y.S. 2d 840, 138 N.E. 2d 221 (1956).

Judge Owen found Persky and the General Partners conducted a campaign to malign Gross. Mr. Steefel, an attorney who represented the Limited Partners testified that the General Partners told him that there were very extensive claims of wrongdoing against Gross (A721, 722). Not one of these partners came to testify in support of these claims, and Judge Owen found them to be "baseless and fraudulent".

Persky himself committed libel per se. He prepared and signed a purported federal summons and complaint in the name of

the Newburger, Loeb partnership against Gross in which he stated that Gross personally churned Buckley's securities account. This was an accusation of personal dishonesty and moral turpitude directed against Gross with regard to his calling and profession, and, therefore, was libelous per se if false. Kleeberg v. Sipser, 265 N.Y. 87, 191 N.E. 845 (1934); Rager v. McCloskey, 305 N.Y. 75, 111 N.E. 2d 214 (1953); White v. Barry, 288 N.Y. 37, 41 N.E. 2d 448 (1942). At the trial it was uncontested that this statement was false: everybody, including Buckley, said Buckley had never had the slightest personal contact with Gross.

Persky published this defamation by passing this purported complaint around to the various participants at the negotiating meeting on February 5, 1971, including the Limited Partners, Subordinated Lenders and their attorneys. He aggravated the wrongdoing by saying the complaint stated a valid cause of action against Charles Gross (A1103).

This complaint (E547) does not come within the scope of the privilege accorded to court papers, because it was never served or filed. The actual complaint in the instant action, served about a month later, was a different document, not brought in the name of the partnership but in the name of the corporation, and containing other changes.

Even if this complaint had actually been served and filed, it would be outside the ambit of privilege, because circulation of a defamatory complaint is not privileged if

malicious; Williams v. Williams, 23 N.Y. 2d 592, 246 N.E. 2d 333, 298 N.Y.S. 2d 493 (1969). As the Court of Appeals noted in the Williams case, the dissemination of a false complaint, if privileged, would be "an ingenious means of defamation." (23 N.Y. 2d at 598).

Thus Persky was guilty of libel against Gross as a matter of law. Since the defamation was committed as one step in a conspiracy, all of the conspirators are liable for it, and the District Court had the right under New York law to impose punitive damages upon those most responsible for the outrage.

Furthermore, we respectfully suggest that New York law regarding punitive damages is not necessarily applicable to this case. The Trial Court found that the instant action, brought in the United States District Court for the Southern District of New York, contained baseless and fraudulent claims made by the conspirators. The defamatory purported partnership claim was also drawn under the caption of the District Court. Under these circumstances we suggest that the United States courts have inherent power -- in the protection of their own integrity and dignity -- to impose punitive damages without reference to state law. This is especially true since Persky, a principal conspirator, carried out some of his outrageous activities under the guise of an officer of this court.

Our adversaries argue that the punitive damages have been awarded against some, and not all, of the conspirators.

We suggest that it is the prerogative of the Trial Court to award or withhold punitive damages against the conspirators on an individual basis, depending upon its view of the degree of outrageous culpability of each.

B. There is No Error in the Court's Finding as to the Amount of Gross' capital interest.

To establish Mr. Gross' capital balance, the adversaries relied upon a Peat, Marwick, Mitchell & Co. financial statement of the Partnership as at December 31, 1970 (E951), plus the underlying work papers. In an informal discovery proceeding these documents were made available to Mr. Gross' accountant, Mr. Lauterbach, at the offices of Peat Marwick (A2544). Mr. Lauterbach prepared a detailed schedule of his disagreements with the account, consisting of 15 items set forth in schedules marked in evidence (E871). This document is the equivalent of objections to the account such as would be filed in a formal accounting proceeding.

At the trial Mr. Lauterbach gave his expert testimony withregard to these matters and he was available for cross-examination upon each of them (A2542-2553). Mr. Lauterbach stated that in his opinion as an expert, the correct valuation of Mr. Gross' capital interest as of the relevant date, December 31, 1970, was $337,921, plus his warrants to purchase 3,094 shares of the common stock of Computer Softwear [illegible]tem Inc., 1,650 warrants to purchase the common stock of Geon Industries Inc. and 2,578 warrants to purchase the stock of Host Enterprises Inc. (A2550). Mr. Gross' capital interest would not change from December 31, 1970 to February 11, 1971 because he was not chargeable with any operating losses after

the end of the calendar year.

The fundamental provision of the Partnership Agreement is that the withdrawn partner is to share profits or losses up to the day of withdrawal (E442), which in Mr. Gross' case was September 30, 1970 (E856). In order to avoid making a separate audit as to the date of withdrawal, the Agreement goes on to state that the profits of losses to the withdrawal date will be determined by an allocation formula applied to the profits or losses of the entire year, based on the ratio of gross business before and after the date of withdrawal. The parties recognized that this referred to "operating losses", a phrase which occurs in Peat Marwick's calculations, as well as Mr. Lauterbach's, and is also recognized in the Finley Kumble brief.

The conspirators gave Peat Marwick & Mitchell instructions to load the operating losses with extraordinary writeoffs and extraordinary losses incurred substantially after the date of Mr. Gross' withdrawal. Indeed, some of these writeoffs were made after the close of the calendar year and applied retroactively. Mr. Lauterbach testified that it was improper to charge Mr. Gross with a share of these extraordinary items and writeoffs occurring after September 30, 1970.

The adverse parties tried very hard to avoid bringing in Peat Marwick accountants as witnesses. Instead, they first proffered the testimony of defendant Risher, one of the New Team, who was not an accountant. It turned out that Mr. Risher's

testimony was an attempt to impose upon the Court. For example, Risher testified with regard to an Atlas Realty settlement apparently made in November 1970 which required payments of $411,655, the entire amount of which was included in the 1970 operating loss. When asked by his own counsel when the actual payment was made, Mr. Risher said that the payment "was made over a period of months" (A2800). Only when counsel for defendants interrupted several questions later did Mr. Risher acknowledge that these payments were to be made over an 18 month period after November 1970, and that the largest part of the payments was not made at all in 1970 (A2801). Further, it is clear that almost all of the remaining payments were never made by the Partnership at all, because they were assumed by the Corporation on February 11, 1971 in the Transfer Agreement.

It next appeared that Mr. Risher was testifying to the effect that under a proper interpretation of the Partnership Agreement, Mr. Gross could be charged with losses subsequent to December 31, 1970 (A2802-2805). This testimony flew in the face of the plain meaning of the agreement (E442). Mr. Risher then attempted to give testimony about the writeoff of certain receivables about which he did not actually have sufficient information (A2810-2815). He then attempted to give evidence about the writeofff of dividends which were 90 days old, but he did not have hard information about this matter (A2818-19). He then testified that a certain reserve for

guaranteed notes contingencies had been erroneously charged, because the money had been received by the Partnership. In this he agreed with Mr. Lauterbach. Mr. Risher attributed the mistake to Peat Marwick (A2820).

He then testified about a reserve, but he did not know how the amount of the reserve was arrived at or who set it up (A2821-2822). Finally, Mr. Risher was caught out in charging a 1971 accounting fee against 1970 operating results. Customarily the year end audit was charged against operations of the subsequent year. Thus the 1969 audit fee was charged against 1970 operating results. However, Risher also set up a reserve in the 1970 figures for the 1970 audit fee. As a result of this reserve, the 1970 operating results were charged with two annual accounting reviews, constituting what accountants call a "double dip" (A2825-2826).

Finally, Risher testified about a large partnership claim for New York State and New York City tax refunds applicable to the 1970 year (A2827). That claim was given zero value in determining Gross' remaining capital interest at the end of 1970, although an expert had been hired and paid to pursue the matter.

Given the effect of all this testimony of Risher, it became obviously necessary for plaintiff and the additional defendants to produce somebody from the Peat Marwick Mitchell & Co. firm. They did not produce the partner who had been in charge of the matter but instead produced a junior named Alvey. It was clear that Alvey was an uncomfortable witness and he was

very careful to testify that the computation of Mr. Gross' capital at $129,561 was not computed in accordance with ordinary and customary accounting standards but with the management's interpretation of the Partnership Agreement (saying at A4122):

> "Q Now, I direct your attention to Schedule I, Line 5, and the column captioned 'Partners Net Equity After Distributions.' Do you see the figure, $129,561?
>
> A Yes.
>
> Q Was that figure computed in accordance with ordinary and customary accounting standards?
>
> A It was prepared in accordance with the management's interpretation of the partnership agreement."

See also Alvey's testimony at A4130-4134.

Prior to issuing the financial report, Mr. McManus of the Peat Marwick firm had sent Risher a letter marked "private" requesting instructions with regard to the distribution of losses among the various partners and questions arising in connection with the accounting (E1038). Mr. Alvey did not know who provided the instructions that McManus received in response to this "private" inquiry. Further, Alvey testified that the Peat Marwick statement made no distinctions, in computing losses attributable to Gross, between ordinary operating losses and extraordinary losses and writeoffs. When asked whether this was in accordance with customary accounting procedures, Alvey very carefully stated "for the firm, yes" (A4135) (emphasis added).

The meaning of this reservation became apparent on cross examination, when Alvey admitted that accounting determinations are made for specific purposes, and that it is a

cardinal accounting principle that determinations are handled differently depending on the situation. He specifically acknowledged that the determination of the loss of the Partnership as a whole can be quite a different matter from the proper determination of the share of loss of a particular withdrawn partner (A4149-4150).* He specifically stated that Peat Marwick did not purport to determine whether Gross should be charged with rent settlements actually paid in 1971 and 1972 (A4150).

The rent settlement in question involved cancellation of a lease for space owned by Atlas Realty in One Manhattan Plaza. Under the lease, the Partnership was scheduled to first occupy this space in 1971, and the lease continued for a twenty year period thereafter (See Risher brief, p. 36). In November of 1970, the Partnership realized that its business was sharply contracted and that it ought to relieve itself, if possible, of this large rent obligation extending ahead for twenty years beginning in 1971. In exchange for giving up the right to receive rent from 1971 through 1990, the landlord agreed to accept the sum of $411,655, payable partly in 1970, and partly in eighteen monthly payments in 1971 and 1972.

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*This point demonstrates the error of Finley Kumble's argument that a reduction of Gross' losses would also reduce the losses of the continuing General Partners to the point where there was no forgiveness of indebtedness. The fallacy in Finley Kumble's position is the assumption that every loss chargeable to the firm, or chargeable to the continuing General Partners, is also chargeable to Gross, a partner who had withdrawn. Recognizing that Gross could not be charged with the cost of buying out leasehold obligations for 1971 and subsequent years, would <u>increase</u>, not decrease, the loss attributable to continuing partners.

Under instructions from "Management", Peat Marwick charged the entire settlement amount as a 1970 operating loss for the purpose of computing Gross' share of profits and losses. Thus, as "Management" worked it, Gross, who was to be charged with losses or profits up to the date of his withdrawal, September 30, 1970, was actually charged with the expense of buying off a lease that would run from the period of 1971 through 1990.

Indeed, the distortion was compounded by the fact that much of this rent settlement was never paid by the Partnership at all, but was assumed by the corporation on February 11, 1971. Since the rent for those years could in no event be allocable to the cost of operations in 1970, and the saving of rent would accrue entirely to the remaining partners, it would seem quite apparent that Mr. Lauterbach was right in his opinion that this was an extraordinary item which was not chargeable to Gross in any part as an expense of 1970 operations.

The total effect of the testimony of Risher, followed by the testimony of Alvey which made it clear that Peat Marwick disclaimed responsibility for the determination of Gross' share of the operating loss, was such that Judge Owen found the conspirators guilty of "... the furnishing of misinformation to Peat Marwick to create a misleadingly low balance sheet" (P535, Footnote 34).

The next question related to the tax refund. Under instructions from the conspirators, this item was

omitted entirely from computation of the year's results, thus increasing the loss chargeable to Gross. When the financial statements were being made up, early in 1971, this asset was being seriously pursued and there would seem to have been no justification for its total omission. Lauterbach took the view that in the absence of a valid showing that it was worth less than face value, the refund should be included in full.

It seems to us that the evaluation of this asset is a question of fact, and that the trial Court made an appropriate evaluation on the basis of the evidence before him. There is no doubt that in so doing the Trial Court had the right to take into account that on some of the items he found that "Management" gave deliberate misinformation to Peat Marwick. We submit that the Trial Court was also entitled to consider that doubts with regard to damages should be resolved against the wrongdoer in favor of the person who has been wronged, especially in an aggravated case such as was before him. As the Supreme Court said in Bigelow v. RKO Pictures Inc., 327 U.S. 251 (1946), Reh. den. 327 U.S. 817, at 327 U.S. p. 265:

> "The most elementary conceptions of justice require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."

THE CROSS APPEAL

POINT V

JUDGE OWEN'S FINDINGS OF FACT COMPEL A JUDGMENT FOR DAMAGES IN GROSS' FAVOR FOR DESTRUCTION OF HIS EMPLOYMENT WITH RAFKIND & CO. THE FINDINGS ESTABLISH AS A MATTER OF LAW THAT THE CONSPIRATORS VIOLATED THE UNITED STATES ANTITRUST LAWS; THE ANTITRUST LAW OF THE STATE OF NEW YORK; FIDUCIARY DUTIES TO GROSS; AND THAT THE CONSPIRATORS WERE GUILTY OF COMMITTING A PRIMA FACIE TORT AGAINST GROSS.

The Trial Court found that the conspirators used an anti-competitive covenant in the Newburger, Loeb & Co. Partnership Agreement to "club" Gross, and that there was no economic motive or justification for destroying Gross' employment with Rafkind other than this desire to club him. The conspirators knew that Gross' activities as a trader for Rafkind could have no possible impact upon the business of Newburger, Loeb & Co., nevertheless, they "suggested to Gross that if he went along with them, they would free him to engage in trading activities with Rafkind... ", but not otherwise. Gross refused to bow to this pressure and Rafkind withdrew from its agreement to employ Gross because it did not wish to involve itself in litigation.

Judge Owen apparently concluded that the anti-competition clause in the Partnership Agreement was valid, and that the conspirators had the "legal right to assert" it against Gross, whatever their motive (P521). It is with this legal conclusion that we disagree. We suggest that the findings, which are established largely by documents and testimony out of the mouths of the conspirators themselves, conclusively establish that the destruction of Gross' employment was wrongful on each of the

four separate legal grounds mentioned in our point heading.

FACTS

The record is undisputed that some months after Gross withdrew from Newburger, Loeb & Co., he reached an oral agreement with Rafkind & Co., under which they would employ him as a trader. Rafkind & Co. agreed to furnish Gross with one-half million dollars worth of buying power, with which Gross would buy and sell stocks for Rafkind's account in order to make trading profits. These profits were to be split equally between Rafkind & Co. and Mr. Gross. Gross had spent most of his life as a professional stock trader, as had Stuart Rafkind, the President of Rafkind & Co. Rafkind had known Gross for many years and regarded Gross as the second best trader in the city. He expected to make substantial profits through Gross' trading.

On January 19, 1971, Rafkind & Co. wrote Newburger, Loeb & Co. a letter (E852) requesting "clearance" to employ Gross, as is required by the rules of the Exchange (A2254).

The business of Newburger, Loeb at that time was being run by Risher and Muh, members of the New Team, who were anxious that the proposed sale of the business go through. Instead of granting clearance, Berkowitz threatened Rafkind & Co. with litigation in a telephone conversation (A228-2290), and later sent a confirmatory letter, stating that Gross was subject to a restrictive covenant, and that the New York Stock Exchange had been so informed (E853). Berkowitz' letter was authorized by Muh and Risher (A3359), and by the General Partners (A2569).

To employ Gross in the face of this record Rafkind & Co. would have had to risk a lawsuit for inducing breach of contract, and face the threat of a complaint to the New York Stock Exchange. Rafkind & Co. refused to accept such exposure, and dropped their employment of Gross. Rafkind & Co. then wrote a letter to Newburger, Loeb & Co. on January 29, 1971 (E854) confirming that because of Newburger, Loeb's objections they would not employ Mr. Gross.

The conspirators apparently recognized that they had gone too far and had created a record dangerous to themselves, so they then wrote a weasel letter under date of February 1, 1971 (E855), purporting to disclaim objections by stating:

> "Any questions concerning the enforcibility of that agreement and whether or not your firm wishes to enter into an employment agreement with Mr. Gross are questions solely for your decision."

Thus, having already killed Gross' employment, the conspirators now sought to avoid responsibility. However, even in this letter the conspirators did not grant any clearance, and did not waive any objections, but merely told Rafkind & Co. that it must proceed at its own risk.

Muh acknowledged on cross-examination that he knew Gross' proposed employment with Rafkind could make no economic difference to the Newburger, Loeb partnership or to the corporation (A3364), but attempted to evade the force of his acts by testifying that he did not intend to stop Rafkind from employing Gross. He said his purpose was merely to convey factual information to Rafkind.

He wanted to make sure he was not "...withholding information and that was factual" (A3365). This preposterous explanation was properly rejected by the Trial Court.

The malicious purpose behind the destruction of Gross' employment with Rafkind was brought home to all of the conspirators by events during a meeting of February 5, 1971 held at the offices of Golenbock & Barell. Among those attending the meeting were Robert Newburger, Persky, Risher, Muh, Ned Frank, Mr. Burak of the Roseman firm (representing the General Partners), Mr. Arthur Silverman (representing Bleich and Donoghue) and Mr. Gross' counsel, Mr. Mandel. In response to an argument made by Mr. Mandel that Gross needed cash to go into business, Risher stated that if a mutual accommodation was reached, Gross would be permitted to have his trading job with Rafkind & Co. (E734,735). Mr. Mandel stated that the Partnership had made a serious mistake in destroying Gross' employment with Rafkind. Risher stated, again, that his point was that if an accommodation was reached, Gross could have his job as a trader.

None of the General Partners or their representatives who were present at this meeting said anything to disavow the destruction of Gross' employment or to indicate a willingness to attempt to undo the damage. Nor did any of the General Partners give testimony at the trial to deny the intent to club Gross by destroying his Rafkind employment.

Gross' damages were very substantial. He did not secure other employment as a trader until several years later. In the meanwhile, his earnings were slight compared to the record of

his earnings as a trader before and after the time of proposed employment by Rafkind.*

The facts concerning the destruction of the Rafkind employment opportunity are pleaded under three different counterclaims of the amended answer. The Ninth Counterclaim alleges these facts as constituting a violation of the Sherman and Clayton Acts. The Fourth Counterclaim alleges these acts as part of the overall conspiracy to injure defendants with regard to their property interests in the Newberger, Loeb & Co. Partnership. The Eighth Counterclaim alleges these facts as wrongful under the laws of the State of New York.

A. Restraint of Gross' Employment as a Trader Was Not Reasonably Necessary for the Protection of the Business of Newburger, Loeb & Co., and therefore Enforcement of the Restrictive Covenant Violated the Sherman and Clayton Acts.

Section 1 of the Sherman Act, 15 U.S.C. §1, provides that every contract combination or conspiracy in restraint of trade or commerce is declared to be illegal. The Clayton Act provides triple damages and attorney's fees for any violation of the Sherman Act.

Although covenants restricting the employment of a former partner or employee are not illegal per se, such restraints are illegal unless they are justified as being reasonably necessary to protect the legitimate business interests of the Partnership or former employers. We believe that Judge Owen's finding that no legitimate business interest of the former Partnership was served by the destruction of Gross' employment with Rafkind necessarily means that the use of the restrictive covenant for that purpose was unreasonable, and

*See p 133, infra.

therefore violative of the Sherman and Clayton Acts.

A conventional and useful starting point for the consideration of the applicable law is United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified and aff'd 175 U.S. 211. The Addyston decision followed just eight years after enactment of the Sherman Act, and provided the classical analysis of the relationship between the new statute and the common law regarding restraints of trade. The Court held that, despite absolute language, the Sherman Act did not outlaw all restrictions upon trade, but excepted from its prohibition certain classes of restrictive covenants which had long been recognized by the common law, provided that such covenants met well-defined tests of reasonable necessity, saying at 85 F. 271, 281:

> "For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in connection with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by

> the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business."

Addyston has served as a landmark decision in anti-trust law. For example, in U.S. v. Paramount Pictures, 66 F.Supp.323 (S.D.N.Y. 1946), Judge Hand relied upon the Addyston formula to test legality under the antitrust laws of clearance provisions in motion picture exhibition contracts. Judge Hand ruled that these clearance provisions were not illegal per se, but fell within the provision that "... a vendor of income producing property may validly covenant with his purchaser not to compete within a given time or in a given area so long as the restrictions are reasonably necessary to protect the value of the property purchased." (66 F.Supp.341) Judge Hand found that many of the covenants in the Paramount Pictures case were unreasonable in scope and therefore violated the antitrust laws. Upon review, the Supreme Court affirmed, saying: "The evidence is ample to show ... that many clearances had no relation to the competitive factors which alone could justify them." 334 U.S. 131, 146 (1948)

The Addyston test of reasonable necessity continues to be applied with full vigor to all kinds of restrictive covenants: Orbo Theatre Corporation v. Loews Incorporated, 156 F. Supp. 770, 777, 778 (D.C.D.C. 1957) aff'd 261 F.2d 380,(D.C. Cir. 1958) cert. den. 359 U.S. 943 (Motion Picture Clearance); Sound Shipbuilding Corp. v. Bethlehem Steel Corp., 387 F. Supp.

252 (D.C. N.J. 1975), aff'd 533 F. 2d 96 (3d Cir. 1976), cert. den. 50 L. Ed. 2d 137 (relating to a covenant restricting the use of land in order to protect the seller's business); American Mot[illegible] Inc. v. Holiday Inn Inc., 365 F. Supp. 1073 (D.C. N.J. 1973) modified on other grounds, 521 F. 2d 1230 (3d Cir. 1975) (restrictive covenants with relation to franchise of motor inn); Ungar v. Dunkin' Donuts of America, 68 F.R.D. 65, 118-121 (E.D. Pa. 1975) reversed on other grounds, 531 F. 2d 1211 (3rd Cir. 1976), cert. den. 50 L. Ed. 2d 84 (restrictive covenants relating to food chain franchise). We believe that there has never been a challenge with regard to the right to damages of a person injured by a restrictive covenant deemed illegal under the Addyston test.

It is an interesting historical fact that although there have been many cases involving the validity of anti-competitive covenants applicable to former employees and former partners, until recently there was a dearth of cases in which the restricted parties sought damages or sought to invoke the federal antitrust laws. This fact is noted and explained in Professor Harlan M. Blake's article Employee Agreements Not To Compete, 73 Harvard Law Rev. 625, 628, n. 8 (1960) as follows:

> "When the required effect on commerce is present, unreasonable postemployment restraints would seem clearly to violate the Sherman Act, with the usual consequences including possible action by the attorney general and treble-damage liability to the injured party. The legislative history and subsequent judicial discussion of the Sherman Act seem clearly to indicate that its purpose was certainly not less than to make illegal those restraints which had been unenforceable

at common law. See Att' Gen. Nat'l Comm. Antitrust Rep. 5-12 (1955). However, the Antitrust Division has in all likelihood never turned its attention to such agreements, and no treble-damage actions have been discovered among the reported thousands of cases. Virtually all were suits brought by employers seeking injunctive relief of damages, or both."

The view that the antitrust laws apply to covenants restricting employment was stated even more emphatically by Professor Goldschmid in 1973 in Antitrust's Neglected Stepchild: A Proposal For Dealing With Restrictive Covenants Under Federal Law, 73 Columbia L.R. 1193, 1204:

"It appears almost frivolous to deal with the question whether an unreasonably restrictive covenant may be treated as an actionable restraint under section 1 of the Sherman Act, since an affirmative answer seems clear. Nevertheless, the absence of direct authority, in an area where many disputes occur annually, compels some care.

"Section 1 of the Sherman Act provides:

"'Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.'

"Certainly, covenants creating post-employment restraints or restraining sellers or lessors should be construed as 'contracts' within the meaning of the Act.

"There is no doubt that the Sherman Act was intended to apply to those restraints that were unenforceable at common law." (footnotes omitted)

The application of the Sherman Act to covenants unreasonably restricting employment seems so clear that we would have limited our discussion of this point to one or two paragraphs

were it not for the impact of this Court's decision in Bradford v. New York Times Company, 501 F. 2d 51 (2d Cir. 1974), which some commentators have interpreted as carrying an implication to the contrary. We do not believe Bradford can properly be so interpreted although, admittedly, it contains some language which seems to indicate skepticism that the federal antitrust laws reach covenants restraining employment.

Preliminarily, we suggest that there is no basis in law or policy for distinguishing covenants which are overbroad in restricting the right to employment from other types of restrictive covenants; the latter, when too broad under the Addyston test, have been held again and again to be illegal under the Sherman and Clayton Acts. Certainly, federal law regards free employment and employment opportunities as one of the interests of society most important to protect, as evidenced by statutes prohibiting discrimination in employment by reason of age, race or creed. Further, it is well settled that the antitrust laws protect employment and employment opportunities against unlawful restraint in other contexts, and that violation gives rise to the relief of triple damages in favor of the employee: Radovich v. National Football League, 352 U.S. 445 (1957) reh. den. 353 U.S. 931; Nichols v. Spencer International Press, Inc., 371 F. 2d 332 (7th Cir. 1967); Roseland v. Phister Mfg. Co., 125 F. 2d 417 (7th Cir. 1942); Tugboat, Inc. v. Mobile Towing Company, 534 F.

2d 1172 (5th Cir. 1976); International Assoc. of Heat & F.I.A.W. v. United Contractors Assoc., Inc. 483 F. 2d 384 (3d Cir. 1973) modified 494 F. 2d 1353.

The following cases in the Southern District of New York specifically recognize that the antitrust laws protect the employment rights of persons working in the stock exchanges and securities industries: Cordova v. Bache & Co., 321 F. Supp. 600 (S.D.N.Y. 1970); Kinzler v. New York Stock Exchange, 62 F.R.D. 196 (S.D.N.Y. 1974); Vandervelde v. Put & Call Brokers Ass'n., 344 F. Supp. 118 (S.D.N.Y. 1972).

All of the above cases recognize that the antitrust laws apply in full to protect employees and the right to employment where the employees are the targets of the illegal acts or are directly injured by them. These cases arose in contexts where the illegality complained of was blackballing or boycott, (Radovich, supra); an illegal agreement between employers limiting the wages that would be paid to employees, (Cordova, supra); where illegal agreements were entered into to prevent employees from switching from one employer to another, (Nichols, supra, and Kinzler, supra). We can perceive of no possible basis for an argument that the antitrust laws protect the rights of employees in every context other than the overbroad, and hence illegal, restrictive covenant in an employment agreement.

It is in the light of these principles that we ask the

Court to approach the statement in Bradford, that:

> "...No court applying the rule of reason has ever held such a contract violative of section 1 of the Sherman Act." (501 F.2d at 59)

The converse is also true; no court applying the rule of reason has ever held that an unreasonable covenant restricting employment was not violative of the Sherman Act. We suggest that the absence of precedents one way or the other is accounted for by the fact, as set forth in Professor Blake's Harvard Law Review article, supra, that almost all of the thousands of cases regarding restrictive covenants have been brought by employers seeking to enforce them. The fact that employees lacked the funds, the advice, and the fortitude to bring such cases should not be misinterpreted to mean that such cases were not properly cognizable under the Sherman Act.

In the brief period since the enunciation of the Bradford decision, there have been two decisions which are premised, at least in part, upon a holding that unreasonable covenants restricting employment are in violation of the federal antitrust laws; Lektro-Vend Corp. v. Vendo Corp., 403 F.Supp. 527 (N.D. Ill. 1975) aff'd _____ F. 2d _____, 1976-1 Trade Cas. ¶60,919 (7 Cir. 1976); Cert. granted, 50 L. Ed. 2d 74; Bowen v. Wohl Shoe Company, 389 F. Supp. 572 (S.D. Tex. 1975).

Furthermore, there have been a number of decisions premised on a finding that the particular covenant against employment was reasonable under the Addyston rule, and therefore not violative of the Sherman Act. The logic of each of these decisions impels the conclusion that if the covenants had been found unreasonable they would also have been found to be violative of the Sherman Act, for no inquiry into the reasonableness of the covenant would have been necessary if the restrictions were deemed to be outside the scope of the antitrust laws: Alders v. AFA Corporation of Florida, 353 F. Supp. 654 (S.D. Fla. 1973); aff'd 490 F. 2d 990 (5th Cir. 1974); Golden v. Kentile Floors, Inc.,512 F. 2d 838, 843-845 (5th Cir. 1975); Nichols v. Spencer International Press, Inc. 371 F. 2d 332 (7th Cir. 1967); Frackowiak v. Farmers Ins. Co., 411 F. Supp. 1301, (D.C. Kans. 1976). In Frackowiak, supra, the Court said:

> "Numerous courts have recognized the general rule that agreements not to compete, entered into in conjunction with the termination of employment or the sale of a business, do not offend the federal antitrust provisions if they are reasonable in duration and geographical limitation." (underlining added). (411 F. Supp. at 1318)

We believe that the Bradford case itself is grounded on the same basis, namely, that tested by the Addyston rule, the restriction in question was reasonable, and therefore not in

violation of the Sherman Act. Plaintiff's lawyer in Bradford urged that the restriction was a per se violation. This argument the Court rejected, relying on Addyston. The actual decision in Bradford turned upon a finding that the particular restriction, in light of all of the circumstances, was reasonable:

> "Having found the agreement before us to be reasonable, we of course must decline without reluctance to find that it constitutes a per se violation." (501 F. 2d 52 at 59)

The essence of the holding in Bradford is emphasized by footnote 5 (501 F. 2d at 59) which points out -- correctly -- that Professor Blake's article does not suggest that "such agreements are 'per se' violative." In Golden v. Kentile, supra, the Court of Appeals for the 5th Circuit interpreted Bradford the same way we do, namely as based upon a finding of reasonableness.

The instant case presents the Court with a new and vivid situation, namely, a direct finding of the Trial Court establishing that a covenant against competition was utilized to deprive a former partner of employment in a situation where the restraint was not in any way necessary for the economic protection of the partnership. From these facts it necessarily follows that the restraint was unreasonable under the Addyston rule.

As we see it, Judge Owen's findings on this issue cannot possibly be challenged. They are based on documents and admissions made by the adversaries. These findings squarely place before this Court the naked question of law mentioned, but not reached, in

Bradford: Does injury to employment inflicted through an unreasonable covenant in restraint of trade or unreasonable application of a covenant in restraint of trade give rise to a treble damage action under the Sherman and Clayton Acts? We suggest that the posture of the instant case gives a pin-point focus to that question, and that, based on the authorities set forth above, the answer is clear: The U. S. antitrust laws apply, and give the right to treble damages.

Certainly, Mr. Gross' aborted trading activity, buying and selling securities through the New York and American Stock Exchanges -- an activity involving numerous transactions with buyers and sellers in various states -- had a sufficient nexus with interstate commerce to invoke the Sherman Act. In Silver v. New York Stock Exchange, 373 U.S. 341, (1963), the Supreme Court held that an improper denial of access to the facilities of the New York Stock Exchange constituted a Sherman Act violation, pointing out that the national exchanges represent a fundamental institution of interstate commerce having a significant effect on the national economy and national economic health and being "'...affected with a public interest in the same degree as any other great utility.'" (373 U. S. at 350, quoting from H.R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934))

Mr. Gross' damages were substantial. Both Mr. Gross and Mr. Rafkind testified that Gross would have received 50% of the profits produced by his trading (A2250). Mr. Gross produced evidence of his lifetime trading result (T868), showing that his average annual trading profit over the years was 98.44% of invested capital. The buying power of $500,000 from Rafkind would have represented $250,000 of invested capital. Accordingly, Mr. Gross' 50% share of profit with Rafkind would have been $123,050 per annum (98.44 x $125,000). Unable to obtain trading employment during this period, Mr. Gross earned, for personal services, only the sum of $18,000 during calendar 1971 and $19,000 during calendar 1972.
These figures indicate that Mr. Gross' damages were in excess of $100,000 per annum, a figure substantially larger than the damages involved in other employee antitrust cases such as Radovich, supra, and Vandervelde, supra.

We believe that under the facts and findings the conspirators were clearly guilty of injuring Gross in violation of the antitrust laws, and that accordingly, Gross should be awarded treble damages, plus attorneys' fees. The Trial Court having decided, erroneously, as we have shown, that the conspirators were legally privileged to enforce the covenant against

competition, did not make a finding as to the amount of damages. We believe that this aspect of the case can be returned to the Trial Court for the determination of damages upon the record.

B. The Destruction of Gross' Employment with Rafkind Violated his Rights Under New York State General Business Law §340

The Eighth Counterclaim sets forth the same facts under the antitrust laws of the State of New York as are alleged under the federal antitrust laws in the Ninth Counterclaim. These claims represent the familiar phenomenon of separate but parallel claims under state and federal law.

On the motion for summary judgment herein Judge Ward ruled that jurisdiction existed over the Ninth Counterclaim because it rested on federal grounds, but that ancillary jurisdiction (other than by way of setoff) did not exist with regard to the parallel Eighth Counterclaim, because the Eighth Counterclaim was not logically related to the facts set forth in the complaint. Judge Owen adhered to the same ruling after trial, and dismissed the Eighth Counterclaim for lack of jurisdiction.

We believe that both judges erred in failing to recognize jurisdiction over the antitrust counterclaim based on state law as (1) logically related to the complaint, or (2) pendent to the parallel federal antitrust counterclaim.

The operative facts applicable to the state antitrust

claim were identical with the facts of the federal antitrust claim. Under these circumstances the parallel claims "so precisely rest upon identical facts as to be little more than the equivalent of different epithets to characterize the same group of circumstances." Hurn v. Oursler, 289 U.S. 238, 246 (1938). Such parallel claims were recognized as pendent even before the liberalizing extension of United Mine Workers v. Gibbs, 383 U.S. 715 (1966), which stated that pendent jurisdiction could exist whenever the claims are such that one would ordinarily be expected to try them all in one judicial proceeding.

The following cases have recognized that state antitrust claims are pendant to federal antitrust claims: Marketing Assistance Plan, Inc. v. Associate Milk Producers, Inc., 338 F. Supp. 1019 (S.D. Tex. 1972); Ammerman v. Bestline Products, Inc., 352 F. Supp. 1077 (E.D. Wis. 1973); Beck v. Athens Bldg. Loan & Savings Association, 65 F.R.D. 691 (M.D. Pa., 1974).

See also the following cases in which state claims, other than state antitrust claims, were held pendent to federal antitrust claims: Deaktor v. Fox Grocery Co., 332 F. Supp. 536 (W.D.Pa. 1971) aff'd 475 F.2d 1112 (3d Cir. 1973), cert. den., 414 U.S. 867; Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, (E.D.N.Y. 1971); Gerecht v. American Ins. Co., 344 F. Supp. 1056 (W.D.Mo. 1971).

The significant difference between Mr. Gross' rights

under federal antitrust laws and the antitrust law of the State of New York is the right to treble damages. The New York statute provides for treble damages pursuant to an amendment which went into effect in 1975. However, in 1971 -- at the time of commission of the wrongs against Gross -- the New York statute provided only single damages. The relevant portions of §340 of the New York General Business Law read as follows:

> "1. Every contract, agreement, arrangement or combination whereby
>
> A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby
>
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained or whereby
>
> For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void.
>
> * * * * *
>
> 5. An action to recover damages caused by a violation of this section must be commenced within four years after the cause of action has accrued."

The test of legality of a covenant restricting employment under the New York law is the same as under the Addyston case, namely, whether the restriction is limited to the degree necessary for protection of the legitimate interests of the employer. In Paramount Pad Co., Inc., v. Baumrind, 4 N.Y. 2d

393, 151 N.E. 2d 609, 175 N.Y.S. 2d 809, (1958), the Court of Appeals set forth the law as though it were a brief for the instant case:

> "The restrictions set forth in the agreement exceed the degree of protection to which Paramount was entitled in order to preserve its legitimate interests. On its face the agreement unreasonably prevents the former employee, Baumrind, from pursuing his occupation where no harm would come to Paramount. Where the restraint imposed is more extensive than the legitimate interests sought to be protected, the restraint is invalid. Absent a breach of confidence, an employer cannot exact from a former employee an agreement to refrain from putting to use the experience gained while working at his trade. (Kaumagraph Co. v. Stampagraph Co., 235 N.Y. 1,9; Clark Paper & Mfg. Co. v. Stenacher, 236 N.Y. 312, 320; ct. Lynch v. Bailey, 300 N.Y. 615) This contract is contrary to the public policy of the state (General Business Law, §340). Hence an action may not be maintained for its breach, nor for inducing its breach." (4 N.Y. 2d 393, 396, 397).

Nor does a distinction lie in the fact that Gross was a former partner, for, like the federal law, the law of New York State applies the same test of reasonable necessity to the covenants of former partners. Indeed, Lynch v. Bailey, 300 N.Y. 615, 90 N.E. 2d 484 (1949), cited by the Court of Appeals in Paramount Pad, supra, is a partnership case. Also, the terms of General Business Law §340 do not distinguish between former partners and former employees; the operative fact is the illegal prevention of employment or the practice of a business, trade or profession.

Accordingly, Judge Owen's finding that there was no economic necessity or justification for the destruction of Gross' employment with Rafkind necessarily requires a conclu-

sion that the restrictive covenant was illegally utilized, and that Gross is entitled to recover his damages.

C. Destruction of Gross's Employment with Rafkind was a Violation of the Fiduciary Duty Owed by all of the Appellants to Gross and Hence Additional Damages Should Be Awarded Under the Conspiracy Counterclaim

Judge Owen found that in the instant case, a provision of the Partnership Agreement was used by the conspirators to destroy Gross' employment with Rafkind as a way of coercing him to agree to a disposition of his partnership rights which Gross felt was not in his best interests. As Judge Owen put it, although enforcement of the noncompetition clause to prevent Gross from acting as a trader had "no economic justification", the conspirators invoked the clause and destroyed the Rafkind employment "as a further club against Gross", who then had no source of income. Judge Owen's findings also recognized that this action was taken as one step of the general conspiracy against Gross, Bleich and Donoghue.

Judge Owen concluded as a matter of law that the conspirators could not be held liable for so utilizing a contractual provision. With this conclusion, we respectfully disagree. Even if it is assumed, arguendo, that the restrictive covenant and its application did not violate either federal or state laws relating to restraints of trade. We believe it clear that the use of the clause for the improper purpose of coercing Gross under the circumstances of this case constituted a breach of fiduciary duty and all of the conspirators are liable for the damages.

D. The Destruction of Gross' Rafkind Employment Also Constituted a Prima Facie Tort

The leading New York case on prima facie tort, Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E. 2d 401 (1946), recognizes and adopts the classic rule of Aikens v. Wisconsin, 195 U.S. 194 (1904) as follows:

> "In Skinner & Company v. Shew & Company [1893], (1 Ch. 413, 422) Lord Justice Bowen said: 'At common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse'. So, in Aikens v. Wisconsin (195 U.S. 194) the court said: 'It has been considered that, prima facie, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of the pleading, requires a justification if the defendant is to escape.' (p. 204, per Holmes, J.) These broad propositions were approved by Sir Frederick Pollock as authority for his doctrine that all wilful harm is actionable unless the defendant justify or excuse his conduct. (Pollock, The Law of Torts [14th ed.], 17-18)." (296 N.Y. 79, 83-84).

See also Opera On Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E. 2d 349 (1941), cert. den. 314 U.S. 615; Williams v. McCarthy, 67 N.Y.S. 2d 763 (Sup. Ct. 1946); J. J. Theatres v. V.R.O.K. Co., 96 N.Y.S. 2d 271 (Sup. Ct. 1950); Williams v. Sinclair Refining Co., 74 F. Supp. 139, 141 (N.D. Tex., 1947); Ames - How Far An Act may be a Tort Because of the Wrongful

Motive of The Actor, 18 Har. L. Rev. 411 (1905); Restatement of Torts §§ 766 and 767.

Judge Owen's finding that there was no economic justification for the destruction of Gross' employment brings this case squarely within the authorities. It cannot be argued that the motive to coerce Gross to go along with the proposed sale of the partnership business represents a legal justification for the harm imposed upon him. Quite to the contrary, this is precisely the type of coercion which the law has condemned as improper motivation. The point is illustrated squarely by the classic case of London Guarantee Co. v. Horn, 206 Ill. 493, 69 N.E. 526 (1903). In this case, the defendant insurance company tried to coerce an employee, Horn, to settle a claim for the loss of two fingers on his right hand on terms unsatisfactory to him. The insurance company threatened that it would cause Horn's employer to discharge him if he would not settle. When Horn refused to yield, the insurance company told the employer it would invoke a cancellation clause in the policy unless the employer discharged Horn, and, faced with this threat, the employer fired Horn. There was no contract of employment; the employment was at will. The Court held that although the insurance company had the right to cancel its contract for a proper purpose, its use of that right in the

instant case for the improper purpose of coercing or injuring Horn was wrongful, and its intent to advance its own interests by forcing Horn to accept a trifling settlement of his personal injury claim was not "justification".

In American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, Ga., 245 U.S. 350 (1921), the Court held that the desire of the Federal Reserve Bank to induce plaintiff bank to join the federal reserve system did not justify a practice adopted by the Federal Reserve Bank to embarrass the plaintiff by collecting checks drawn on the plaintiff bank until a considerable number were on hand, and then demanding payment in cash over the counter. The defendant argued that the holder of checks has a right to present them for payment all at once whatever his motive or intent. The Supreme Court rejected this argument, and, holding that the Bank's motive was not proper justification for its act threw the case into the class of acts performed for "disinterested malevolence", saying, per Mr. Justice Holmes:

> "... it is not enough to refer to the general right of a holder of checks to present them but it is necessary to consider whether the collection of checks and presenting them in a body for the purpose of breaking down the petitioner's business as now conducted is justified by the ulterior purpose in view." (256 U.S. 350,359).

From the foregoing, it will be seen that even if it is assumed, arguendo, that the restrictive covenant was binding and valid, and that there was an unquestioned right to enforce it for a proper motive, the use of this clause to destroy Gross' employment for the purpose of coercing him to give up his rights with regard to the Partnership is not legally "justified", and therefore makes the wrongdoers liable for the "temporal damage" inflicted upon Gross.

CONCLUSION

We believe that this Court should:

(1) Dismiss the appeals of plaintiff and additional defendants on counterclaims.

(2) Remand the matter to Judge Owen to assess damages on the Record with regard to the wrongful destruction of Gross' employment with Rafkind, as is demanded by the cross-appeal.

Dated: New York, New York,
March 9, 1977.

Respectfully submitted,

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Ralph Wienshienk
Bernard Rothman
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Arthur Tarlow

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

KENNETH KAUFSTINE, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 780 CONCOURSE VILLAGE WEST BRONX N.Y.

That on the 11th day of MARCH, 1977, deponent personally served the within BRIEF OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

OSMOND K. FRAENKEL
Attorney for Additional Defendants on
Counterclaims-Appellants-Cross-Appellees
Newburger, Loeb & Co., Andrew M. Newburger, Robert L. Newburger, Rober L. Stern, Richard D. Stern, Walter D. Stern and Robert L. Stern, as Executors under the Last Will and Testament of Leo Stern, deceased; and Sanford Roggenburg
120 Broadway
New York, N. Y. 10005

Kenneth Kaufstine

Sworn to before me this

11th day of MARCH, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JULIO VALLEJO, JR., being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 703 REMSEN AVE. BROOKLYN, NYC.

That on the 11th day of MARCH, 1977, deponent personally served the within BRIEF OF DEFENDANTS--APPELLEES--CROSS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

PAUL D. RISHER
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Appellant-Cross-Appellee Pro Se
200 Park Avenue, New York, N. Y. 10017

LAWRENCE BERKOWITZ
Additional Defendant on Counterclaims-
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ROBERT S. PERSKY
Additional Defendant on Counterclaims-
Appellant-Cross-Appellee Pro Se
521 Fifth Ave., New York, N. Y. 10017

Julio Vallejo, JR

Sworn to before me this
11th day of MARCH, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

TERRY HORNER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 35 FIFTH AVE. NEW YORK, N.Y.

That on the 11th day of MARCH, 1977, deponent personally served the within BRIEF OF DEFENDANTS--APPELLEES-- CROSS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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595 Madison Ave.
New York, N. Y. 10022

Terry D. Horner

Sworn to before me this

11th day of MARCH, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

John F. Marron, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 6056 - 68 St. Maspeth, N.Y. 11378.

That on the 11th day of MARCH, 19 77, deponent personally served the within BRIEF OF DEFENDANTS--APPELLEES-- CROSS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

ELAINE PLATT, ESQ.
Attorney for Additional Defendant
on Counterclaims-Appellant-Cross-
Appellee Charles Sloane
136 East 36th St.
New York, N. Y.

John F. Marron

Sworn to before me this

11th day of MARCH. 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978